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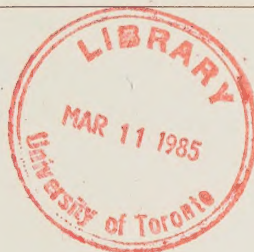


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September 84

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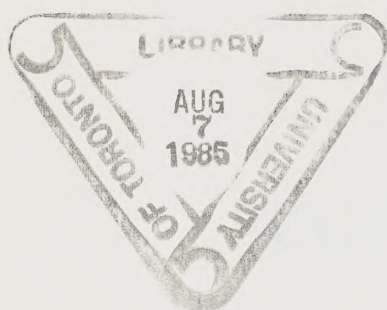
**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: NIMAL V. DISSANAYAKE

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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Certification — Construction Industry — Practice and Procedure — Issue of whether work maintenance or construction arising in certification proceeding — Employee and employer bargaining agencies not entitled to notice — Designated employer bargaining agency not having legal and direct interest — Not entitled to be joined as party by intervention

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and H. Kobryn.

APPEARANCES: *Malcolm Boyle, Georges Meservier, Mel Milbovich and Vern Astrom for the applicant; Paul S. Jarvis, Richard Dickson and J. Popeau for the respondent; William J. Moore for intervener #1; J. J. Nyman, M. Pupeza and R. Balina for intervener #2; Thomas Steele for intervener #3.*

DECISION OF THE BOARD; September 19, 1984

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The application raises an issue, amongst others, of whether the respondent operates a business in the construction industry, and, therefore, is an employer for purposes of the construction industry provisions of the Act. The answer to that question depends on whether the work which the employees affected by the application were performing at the time it was made was work in the construction industry or, as the parties put the question, whether it was maintenance work or construction work.

3. The applicant is seeking to represent all journeyman and apprentice plumbers and pipefitters employed by the respondent in the industrial, commercial and institutional (ICI) sector of the construction industry in the Province of Ontario and in all other sectors in the District of Thunder Bay. That is the construction industry bargaining unit which normally would be found to be appropriate for the applicant. Should the Board find that the respondent is not an employer for purposes of the construction industry provisions, the application would not be processed under those provisions, but could be processed under the general provisions pursuant to section 5 of the Act. Since the applicant does not wish to seek certification for a non-construction unit, however, a finding that the employer was not an employer under the construction industry provisions would dispose of the application. For that reason, the Board ruled in the hearing that it would hear evidence and representations respecting that issue and decide it first.

4. During the course of the proceedings, the Mechanical Contractors Association of Ontario ("the MCAO"), through counsel, sought to be made a party to the proceedings. There being no challenge to its right to make that request, the Board heard the representations of

MCAO's counsel and of all the parties. The submissions of the applicant and intervenor #1 supported the MCAO's request to be made a party to the proceedings, while those of the respondent and intervenor #2 opposed it. Intervenor #3 did not take a position either way. The Board then reserved its decision and adjourned the proceedings. This interim decision is the Board's ruling on the issue.

5. The MCAO is the employer bargaining agency designated pursuant to section 139 of the Act to represent in collective bargaining in the industrial, commercial and institutional (ICI) sector of the construction industry, all employers of journeymen and apprentice plumbers and pipefitters for whom the applicant ("Local 628") and most of its sister locals of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the United Association") hold bargaining rights in the ICI sector. Its request to be made a party to the proceedings is based on its role as the employer bargaining agency for the employers of those two trades. MCAO counsel contends that the MCAO should be made a party to the proceedings on two grounds:

- (1) The MCAO should have been given notice as the designated employer bargaining agency because, if a certificate should issue to the applicant, the MCAO would have a statutory obligation to represent the respondent in collective bargaining with respect to the ICI sector;
- (2) the threshold issue of whether the work being performed by the employees affected by the application is maintenance work or construction work is an important issue to the MCAO and its members for which it has bargaining rights and which perform the plumbing and pipefitting work at issue.

6. The MCAO is not a party which was entitled to notice of this application and of the hearing into it pursuant to any provisions of the Act or the Board's Rules of Procedure. The Board's Rules of Procedure with respect to applications for certification under the construction industry provisions require that:

- (1) the respondent be served with a copy of the application and notice of it [section 91(2)(a)];
- (2) any trade union named in the application or reply to it as claiming, or known to the Registrar as claiming to be the bargaining agent of or to represent any employees who may be affected by the application, be served with a copy of the application and notice of it [section 94]; and
- (3) where a hearing into the application is required (as it was here), notice of the hearing be served on the applicant, the respondent, any trade union in (2) which has duly filed an intervention or intervenor's application and any employee or group of employees who have duly objected to the application, or the representative of such a group of employees [section 98].

There are no objecting employees in the instant application and interventions were duly filed by each of the three intervenors. It is uncontested that they hold bargaining rights by means of collective agreements with the respondent. The parties to this application, therefore, are the

applicant, the respondent and the three interveners. These are the parties who are entitled to and who did receive due notice of the hearing.

7. Neither the Act nor the Board's Rules of Procedure require that the Board serve notice on a designated employee bargaining agency or a designated employer bargaining agency respecting applications for certification made under the construction industry provisions of the Act. Nor has it been the Board's practice to serve notice of applications for certification on such bargaining agencies except in circumstances where section 94 of the Rules of Procedure would apply to an employee bargaining agency. Similarly, prior to provincial bargaining, an employers' association accredited by the Board to be the exclusive bargaining agent to represent a unit of construction industry employers whose employees are represented by a common trade union, became obligated by operation of statute to represent in collective bargaining any employer for whose employees that trade union acquired bargaining rights in the ICI sector. Such employers' associations were not entitled under the Act or the Rules of Procedure to notices of applications for certification. Nor was it the Board's practice to serve them with notice. That remains to be the case with accredited employers' associations in sectors other than ICI. Therefore, in order for the MCAO to be entitled to notice of and participate in these proceedings, it would have to establish that it has a legal and direct interest in them. See the Board's decision in *Napev Construction Limited and Vepan Leaseholds Limited*, [1976] OLRB Rep. Mar. 109, upheld on judicial review in *Re Bricklayers, Masons, Independent Union of Canada, Local 1 and Ontario Labour Relations Board*, Ont. Div. Court, 218/76, dated May 24, 1977, unreported. The question, then, is whether either of the two bases on which the MCAO seeks to be made a party to the proceedings gives it that direct, legal interest.

8. In *Napev and Vepan*, *supra*, the Board was dealing, amongst other things, with an application under section 1(4) of the Act to have Napev and Vepan treated as one employer for purposes of the Act. Such applications raise issues of representation rights similar to applications for certification or for termination of bargaining rights. In the *Napev and Vepan* case, a trade union rival of the applicant sought to be made a party to the proceedings. It was not in a collective bargaining relationship with either Napev or Vepan and did not represent employees of either company. The trade union contended that it should be granted intervener status because a declaration by the Board that Napev and Vepan be treated as one employer would cause a third company to lose a sub-contract with Vepan. The trade union had bargaining rights for employees of the third company and those employees, members of the trade union, would lose their jobs if their employer lost its sub-contract. The Board refused to make the trade union a party to the proceedings. One of the grounds for doing so was that the trade union did not meet certain requirements which are similar to those contemplated by sections 94 and 98 of the Rules of Practice respecting notices of applications for certification and hearings into them. In so doing, the Board described the rationale behind those requirements in the following terms:

15. Where attempts have been made to intervene in certification proceedings, the Board has consistently held that, in order to safeguard the rights of parties originating proceedings, and with a view to eliminating delay by parties claiming an interest, a would-be intervener must meet certain requirements. *These requirements are deemed necessary in the field of industrial relations where time is indeed of the essence in order to avoid delay, multiplicity of proceedings and frustration of the purposes of the Act by parties who have no real representative status with respect to the employer and the employees involved.* The Board has always required that an inter-

vener must be either an employee in the bargaining unit to which the proceedings relate or a union holding representational authorization from one or more persons in the bargaining unit, or be the bargaining agent for employees in the bargaining unit. In the absence of these requirements, intervention has been denied.

(emphasis added)

The Board then considered whether by analogy with the following common law standard the trade union had a direct and legal interest in the proceedings so as to be made a party to them; the Board concluded not.

17. There is a rule at common law which states that a person who would only be commercially and incidentally injured by a judgment is not entitled to be made a party to an action on the ground of such prospective injury. (See *Moser v. Marsden* (1882), 1 CH. 487 at 490 (C.A.).) The plaintiff in that case was the patentee of a machine and brought an action against the defendant for using a machine which he alleged was an infringement of his patent. The foreign manufacturer of the machine applied to be added as a defendant alleging that a judgment in the action would injure him and that the defendant would not properly defend the action. The court held that the foreign manufacturer was not directly interested in the issues between the plaintiff and the defendant, but would only be indirectly or commercially affected and consequently had no right to intervene.

18. This case has been followed in Ontario in *Westgate v. Sudbury Rand Mines Ltd.*, (1940) O.W.N. 258 (Master Barlow) at 259:

The law is neatly stated in Holmstead, 5th ed., p. 656 as follows:

‘A person who would be commercially and incidentally, but not legally and directly, injured by a judgment being obtained against the defendant in an action, is not entitled, on the ground of such prospective injury, to be made a party to the action.’

See *Moser v. Marsden*, (1882) 1 Ch. 487.

9. The first basis on which the MCAO is relying is that this application represents the possibility of it becoming the bargaining agency for the respondent if the Local 628 is certified to represent the respondent’s plumbers and pipefitters. Until certification is a fact, the MCAO has no rights, duties or obligations respecting the respondent. There are clearly two steps to the acquisition by the MCAO of rights, duties and obligations to the respondent with the second step coming automatically on the heels of the first.

10. The first step is the creation of bargaining rights for Local 628 with respect to employees of the respondent. Local 628 is an affiliated bargaining agent of the United Association and its Ontario Pipe Trades Council (“the Council”) which, together, are the designated employee bargaining agency for journeymen and apprentice plumbers and pipefitters employed in the ICI sector for whom the United Association, the Council and any other local unions of the United Association which are captured by the designation order hold

bargaining rights in that sector. Those locals, the United Association and the Council are also affiliated bargaining agents of the employee bargaining agency within the meaning of section 137(1) of the Act. When any one of them makes an application under section 144(1) of the Act, as this one purports to be made, that section mandates the application be brought on behalf of all affiliated bargaining agents of the employee bargaining agency. If the applicant has the requisite membership support for a certificate to be issued, section 144(2) directs the Board to certify the trade unions on whose behalf the application was brought (i.e., the affiliated bargaining agents captured by the designation order). Thus, if the Board certifies Local 628 with respect to the ICI sector, the certificate directly creates bargaining rights for the other affiliated bargaining agents respecting the respondent's employees in the ICI sector. The issuing of the certificate does not create of itself any representative rights for the MCAO respecting the respondent. While the certificate would be the triggering device for the MCAO to acquire those rights, only after the certificate were to issue would the MCAO acquire representative status respecting the respondent.

11. That is the second step in the creation of the MCAO's representative status and it occurs automatically because of the operation of several sections of the Act. Upon certification, Local 628, the other affiliated bargaining agents and the respondent become bound pursuant to section 145(4) of the Act to the pipe trades provincial agreement. The respondent and Local 628 are prohibited by operation of section 146(2) of the Act from bargaining or attempting to bargain or from concluding any other agreement or arrangement with respect to Local 628's bargaining rights in the ICI sector than the provincial agreement. That section of the Act makes the provincial agreement the only lawful collective agreement for parties who are part of the provincial bargaining scheme, as are the United Association, the Council and their affiliated local unions and any employers of employees for whom they hold bargaining rights in the ICI sector. A provincial agreement by definition (clause e of section 137 of the Act) is an agreement made between an employer bargaining agency and an employee bargaining agency and, pursuant to section 147(2) of the Act is binding on those agencies, the employers and trade unions for which they bargain and the employees of the employers for whom the trade unions hold bargaining rights in the ICI sector.

12. While those sections would operate together to make the MCAO the exclusive bargaining agency for the respondent if a certificate issues to Local 628 as a result of this application, the MCAO becomes the bargaining agency for the singular purpose of conducting bargaining and concluding a provincial agreement. This is clear from clause a of section 143 of the Act which provides as follows:

143. Where an employer bargaining agency has been designated under section 139 or accredited under section 141 to represent a provincial unit of employers,

(a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement.

The only other sections in the province-wide bargaining part of the Act which relate to the exercise of employer and employee bargaining agencies' bargaining rights are section 147(3) which makes them parties for purposes of grievance referrals under section 124, and section 151 which imposes a duty of fair representation on the bargaining agencies respecting the

employers and trade unions which they represent. Sections 147(3) and 151, respectively, provide as follows:

147.-(3) Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purpose of section 124.

151.-(1) A designated or certified employee bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of the affiliated bargaining agents in the provincial unit of affiliated bargaining agents for which it bargains, whether members of the designated or certified employee bargaining agency or not and in the representation of employees, whether members of an affiliated bargaining agent or not.

(2) A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not.

13. In order to decide whether the rights, duties and obligations which would accrue to the MCAO if a certificate issues to Local 628 would create a direct legal interest in these proceedings, it is useful to examine how the provincial bargaining scheme created by the Province-Wide Bargaining part of the Act (sections 137 through 151) operates. The provincial bargaining scheme is generally referred to as single-trade, multi-party and industry-wide bargaining. The scheme contemplates provincial units of employers represented by a designated employer bargaining agency bargaining with a building trade union represented by a designated employee bargaining agency with respect to a provincial bargaining unit of the employees of the employers in the trade represented by the union and for whom the union holds bargaining rights in the ICI sector. In the context of this application respecting the plumbing and pipefitting trades, for example, the MCAO bargains with the United Association and its Ontario Pipe Trades Council on behalf of all employers who employ plumbers and pipefitters for whom the United Association and any of its affiliated bargaining agents hold bargaining rights in the ICI sector.

14. The rights, duties and obligations of an employer bargaining agency under this scheme were discussed by the Board in its decision in *Beckett Elevator Company Limited*, [1982] OLRB Rep. Sept. 1244, in the context of a referral of a grievance under section 124 of the Act. Beckett was represented in the provincial bargaining scheme by the National Elevator and Escalator Association ("NEEA"). Beckett was not a member of NEEA and was a member of a rival employer's association which had no bargaining status. The Board found it necessary to inquire into whether certain provisions in the provincial agreement respecting the handling of grievances constituted an extension of the employer and employee bargaining agencies' bargaining rights beyond bargaining and into the on going administration of the collective agreement. The collective agreement purported to give to a Joint Industry Committee ("JIC"), which the Board described as the alter ego of NEEA and the employee bargaining agency, the authority to make final and binding settlements of grievances under the collective agreement. The Board ultimately found that these particular provisions pre-empted arbitration, something which the bargaining agencies did not have the power to do. In the process, beginning at paragraph 14 and following a few brief comments on various studies dealing with labour

relations in the construction industry and the perceived need to stabilize collective bargaining in the industry, the Board commented in the following manner on the operation of the provincial bargaining scheme.

14.

• • •

The Minister is given a broad authority to designate such employer or employee bargaining agencies as he sees fit in accordance with his own assessment of the requirements of the situation (which may, of course, include the representativeness of the employer association). But having endorsed the proposition that extended area bargaining is more conducive to industrial relations stability, the Legislature has also sought to protect the individual employer's authority to deal with his own employees, subject to the terms of the province-wide collective agreement. The employer's rights are vested in the designated bargaining agency *only for the purpose of collective bargaining and concluding a provincial collective agreement*. The day to day relationships between the employer and his employees, the administration of the collective agreement, and the application of that collective agreement to the circumstances of individual employers, are all left for resolution at the local level — subject only to the injunction that there cannot be a local arrangement inconsistent with the provincial agreement (see section 146 of the Act). Thus, while recognizing the necessity of vesting considerable authority in the employer association for the purposes of collective bargaining, the Legislature has sought to limit that authority to the conduct of bargaining. In addition, the designated bargaining agencies are both under a statutory obligation to represent their constituents in a manner that is neither arbitrary, discriminatory, nor in bad faith (see section 151).

[original emphasis]

15. The new province-wide bargaining scheme is an attempt to reconcile different and potentially competing concerns: the need for extended area bargaining in order to promote industrial relations efficiency; and the desire to recognize, to some degree, the autonomy of the individual employer. Both objectives are important, and it is hardly surprising that the Legislature should attempt to strike a balance between them — especially since, on the “employer side”, the interests at issue may be much more diverse than on the “union side”, where, by definition, all of the union locals represented by the designated employee bargaining agency must be affiliated to a common trade union parent (although even on the “union side” there is sometimes competition between locals and friction with the employee bargaining agency). The employers represented by the designated employer bargaining agency may be active competitors in the market-place, with diverse and conflicting interests, and may not even be members of the employer association with the statutory right to represent them. Thus, the Statute provides that the employer association has the right to negotiate the agreement in the first instance, there is a prohibition against local

arrangements, and the employer association has access to this Board under section 124/or section 89 in order to ensure that the system is being maintained and the agreement is being uniformly administered. By the same token, however, the local union (affiliated bargaining agent) and employer have access to this Board under section 124, the Statute restricts the role of the designated bargaining agents to “conducting bargaining and concluding a provincial agreement,” and there is a statutory duty of fair representation.

16. In the instant case, the NEEA clearly has the legal authority, by virtue of section 143 of the Act, to represent Beckett — but only in accordance with that section and, consequently, “only for the purpose of conducting bargaining and concluding a provincial agreement”. Article 14 of the collective agreement, however, includes a mechanism representing the union and the NEEA — but not Beckett — which in their submission can render a decision which is final and binding upon all parties. That decision can include a definitive interpretation of the collective agreement, a finding that there has been a breach of its terms, a direction that compensation be paid, and an order as to costs. But an individual employer like Beckett is unrepresented on the decision-making body. At most, such employer can, as Beckett did in this case, make submissions that it does not feel that there has been a breach of the agreement, or that the measure of damages is not that ultimately assessed by the JIC. There are none of the procedural or legal safeguards which would be available before this Board or a board of arbitration.

17. We have carefully considered the submissions of the union and the NEEA, and we are not unmindful of the valuable role which the JIC was played, and can continue to play in resolving labour disputes in the elevator industry. However, in our view, the thrust and intent of the legislation is clear: a designated employer bargaining agency cannot, through the process of collective bargaining itself or otherwise extend its role beyond “the conduct of bargaining and concluding a provincial agreement”. No doubt the designated bargaining agency will have an interest in the enforcement of such collective agreement, and such interest would give it status to appear in any arbitration proceeding involving that agreement. There is also a legitimate concern that the agreement be applied uniformly and not be undermined by contradictory local arrangements. Moreover, as a practical matter, if the designated employer and employee bargaining agencies are *ad idem* on the meaning of the terms which they have concluded, an employer bound by that agreement might be hard pressed to prove that they are wrong. JIC decisions might also provide some evidence of the parties’ intentions, or, if duly incorporated by reference, may come to be terms of the contract. The parties may even find it necessary to amend the agreement during its operation to meet changing circumstances, and, subject to section 151, there is no reason why they cannot do so. However, *to suggest that the designated bargaining agencies may have a role to play in interpreting the collective agreement is not to say that, through a mechanism of their own creation, they can reserve to themselves the exclusive right to determine whether the agreement has been properly applied or administered by an*

individual employer which is not a member of the employer association and has not delegated such authority to it. . . .”

[emphasis added]

15. When the Legislature limited the role of employer bargaining agencies to that set out in section 143(a) of the Act, as the Board stated in the Beckett decision, the Legislature was striking a balance between the need for extended area bargaining as a means of promoting industrial relations efficiency in the construction industry and a desire to recognize the autonomy of the individual employer. There is nothing in the legislation which explicitly or implicitly gives an employer bargaining agency a voice in the process under which bargaining rights are established in the ICI sector of the construction industry. This is made clear by reference to section 144(1) of the Act which expressly provides that an employee bargaining agency is entitled to make an application for certification which relates to the ICI sector and is silent with respect to the role of an employer bargaining agency. That provision of the statute was the subject of two bills passed by the Legislature before section 144(1) became law in its present form. The Board is satisfied, therefore, that neither the Act nor the Rules of Procedure provide for employer bargaining agencies to be given notice of or be made parties to applications for certification.

16. Even were the Board to find, nonetheless, that employer bargaining agencies like the MCAO had a direct, legal interest in applications for certification because of their role in provincial bargaining, that still would not assure them a voice in the creation of all bargaining rights which trigger for employer bargaining agencies the obligation to bargain on behalf of employers. Voluntary recognition agreements still play a significant role in the acquisition of bargaining rights by building trade unions which are parties to the provincial bargaining scheme. Section 144(4) of the Act recognizes that reality by providing the mechanism and setting the standards for voluntary recognition agreements within the provincial bargaining scheme. Bargaining rights so acquired have the same legal result as the Board's certificates. The Act, however, does not give the Board any general jurisdiction to intervene in or otherwise supervise the creation of bargaining rights by voluntary recognition, except upon an application made under section 123(2) of the Act for a declaration terminating those bargaining rights. Nor does section 144(4) of the Act provide for employer bargaining agencies to participate in the creation of those rights. Therefore, employer bargaining agencies would have no voice in affiliated bargaining agents acquiring, by voluntary recognition, bargaining rights in the ICI sector which would trigger a legal obligation for an employer bargaining agency to bargain on behalf of the employer party to the voluntary recognition agreement.

17. Having regard to all of the foregoing, the Board concludes as follows with respect to the MCAO's first basis for requesting that it be made a party to these proceedings. Sections 144(1) and 144(4) read together with the definition of bargaining unit in section 1(1)(b) of the Act make it clear that the Act contemplates that bargaining rights in the ICI sector for building trade unions covered by the provincial bargaining regime be acquired without reference, explicit or implied, to employer bargaining agencies. They are acquired by the trade union on behalf of its other affiliated bargaining agents with respect to the employees of *an employer*. The critical issues in any application for certification which relates to the ICI sector are whether the applicant is a trade union within the meaning of section 1(1)(p) and an affiliated bargaining within the meaning of section 137(1)(a) of the Act; whether the applicant and respondent are parties to which section 119 applies; whether the bargaining unit sought by the applicant is appropriate for collective bargaining; and whether the applicant has as members

the requisite number of employees in the bargaining unit to be entitled to a representation vote or certification without a vote. The parties to the instant application directly affected by those issues are Local 628, the respondent and the three interveners. They are the parties of interest within the meaning of the Act and the Rules of Procedure. The MCAO's status as the potential employer bargaining agency for the respondent is not directly affected by the Board's determination of those issues, although, if their determination results in the Board issuing a certificate to Local 628 covering the ICI sector, the MCAO will become legally obligated to bargain for the respondent. That result occurs, however, not by the Board's finding that Local 628's application satisfies the requisite conditions for a certificate to issue, but incidentally by operation of statute following upon the certificate issuing. In these circumstances, the MCAO does not have a direct legal interest in the processing of the application for certification.

18. The MCAO's second basis for its claim that it should be made a party to these proceedings is that the threshold issue being dealt with by the Board raises a question of whether the work being performed by the respondent's employees is construction work. Counsel for MCAO submitted that the determination of that question was a matter of important concern to the MCAO and the employers who are its members and perform that kind of work. Therefore, it should be made a party to the proceedings in order to protect its interest and those of its members. The threshold question which the Board must answer is whether the respondent operates a business in the construction industry within the meaning of clause c of section 117 of the Act. The wording of clause c invokes section 1(1)(f) which defines construction industry to mean:

“... the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.”

19. The answer to that question may be important to the MCAO for any number of reasons, some of which may relate to the commercial interests of its members and others to the role of the MCAO as the employer bargaining agency for its members and other employers for whom it is the bargaining agency. However, until such time as the provincial agreement applies to the work, the MCAO's interest, insofar as this application is concerned, is limited to the potential application of the provincial agreement to the respondent's work. The agreement only has actual application to the work on or after the date when a certificate issues to Local 628. Even then, the MCAO's interest would arise only if a party to the provincial agreement alleged that the employer was performing the work at issue contrary to the provisions of the provincial agreement.

20. If the MCAO is concerned that a determination by the Board that the work at issue was not work in the construction industry might affect its interest if a similar fact situation arose in the future, obviously the Board's determination could not be binding on the MCAO since it would not have been a party to the determination. That would apply also if the Board finds that the work is construction work, ultimately certifies Local 628 and later a similar fact situation arises in the context of a referral of a grievance under section 124 of the Act or a work assignment dispute under section 91 of the Act in which the MCAO was an intervener. Those are concerns for the precedential effects of the Board's decision. Were the Board to accept those concerns as a proper basis for granting status in its certification proceedings, almost any person might successfully claim an interest sufficient to be made a party to those proceedings. To adopt the words of the Board in *Napev and Vepan*, *supra*, that clearly would be contrary to the need “... to avoid delay, multiplicity of proceedings and frustration of the purposes of

the Act by parties who have no real representative status with respect to the employer and the employees involved.”.

21. The courts have rejected precedential effect as grounds for being joined as a party to proceedings before the court. See *Schofield v. Minister of Consumer and Commercial Relations*, (1980), 28 O.R. (2d) 764. In that case a solicitor was seeking to be made a party to an appeal on behalf of two clients whom he was representing in separate actions from that under appeal on the grounds that his clients had a direct interest because the outcome of their cases would be determined by the outcome of the appeal. Wilson, J.A., as she was then, speaking for the majority of the court in rejecting the solicitor’s claim for status, said in part “. . ., it seems to me that the fact that a decision . . . may be applied subsequently by another Court as a precedent . . . is not a sufficient interest to justify a grant of standing. . ..”.

22. The Board finds nothing in the submissions of the parties to persuade it that the MCAO or its members will be legally and directly injured or prejudiced by the Board’s determination of the threshold issue of whether the respondent operates a business in the construction industry. Nor does the Board find anything in the submissions of the parties to persuade it to exercise its discretion to determine its own practice and procedure to make the MCAO a party to the proceedings. In the result, the Board is satisfied that the issue of whether the respondent operates a business in the construction industry will be fully and fairly argued by the parties to this application.

23. In summary, for all of the foregoing reasons, the Board finds that the Mechanical Contractors Association of Ontario is not a party of interest within the meaning of the Act in respect of this application for certification and it is not a party with a direct, legal interest in the application. Accordingly, the MCAO is not a party to these proceedings.

24. The Registrar is directed to list this matter for continuation of hearing on the earliest possible date.

2488-82-R United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Aero Block and Precast Ltd.**, Kamet Enterprises Ltd. and 541190 Ontario Inc., Respondents, v. The Form Work Council of Ontario, Intervener #1, v. Labourers' International Union of North America, Local 493, Intervener #2

Bargaining Unit — Certification — Construction Industry — Practice and Procedure — Whether carpenters' ABA can carve out its trade from incumbent's unit — Whether entitled to take trades other than traditional trade in "all other sectors" part of unit — Whether unit including other trades appropriate — Whether Board treating application as being for two separate units — Whether concrete forming construction units having special status re appropriateness

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *D. J. Wray, M. A. Church and Dale Chappell for the applicant; Jeremy Forgie, Denis Cancian and Brian Smeenck for the respondents; B. Fishbein, D. Henri and Q. Ceolin for the interveners.*

DECISION OF THE BOARD; September 19, 1984

1. This application for certification in the construction industry in which a pre-hearing representation vote has been held came before the Board previously for hearing on a number of issues. The parties agreed at that hearing that the Board should deal first with a single issue respecting membership evidence which could dispose of the application. When the result did not dispose of the application, the application came back on for hearing. In the interim and at the Board's direction the parties had conferred with respect to how to proceed with the issues remaining. As a result, when the parties came before the Board, they were agreed that the Board should hear and determine two inter-related issues with respect to the determination of the appropriate bargaining unit. Such determinations are made after a pre-hearing representation vote has been taken. The finding of the appropriate bargaining unit is a pre-requisite for finding whether not less than 35 per cent of the employees in the unit were members of the applicant at the time the application was made. In the instant case, it is also a pre-requisite to the counting of the ballots which have been cast.

2. The Board proceeded pursuant to the agreement of the parties to hear their submissions with respect to whether the applicant United Brotherhood of Carpenters and Joiners of America ("the Carpenters"):

- (1) would be required by the Board to displace the bargaining rights held by the intervener Labourers' International Union of North America, Local 493 ("the Labourers'") and represent the respondents' employees in the same bargaining unit which presently defines the Labourers' bargaining rights; and
- (2) are entitled to apply to represent all of the respondents' employees employed in sectors of the construction industry other than the industrial commercial and institutional (ICI) sector.

Those are broad statements of the issues. The specific variations in which the issues present

themselves and their significance to the determination of the appropriate bargaining unit for this application will become evident in dealing with the parties' submissions on the issues.

3. The Board, for the reasons given in paragraph 4 of its decision directing that a pre-hearing representation vote be held, has declared that the respondents be treated as one employer for purposes of the *Labour Relations Act* and that they were bound at the time this application was made to a collective agreement between the Ontario Formwork Council and the Ontario Formwork Association ("the Agreement") which was effective from May 11, 1981 until April 30, 1983. The Formwork Council ("the Council") purports to be a council of trades unions and the Ontario Formwork Association purports to be an association of employers. The Agreement purports to recognize the Council as exclusive bargaining agent for a unit of all construction employees in the Province of Ontario.

4. The Carpenters are seeking to be certified for the respondents' employees in the following bargaining unit:

All carpenters and carpenters' apprentices in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees employed by the respondents in all other sectors within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except operating engineers, non-working foremen and persons above the rank of non-working foreman.

The voting constituency for the pre-hearing representation vote was described in identical terms.

5. Counsel for the interveners argues that the respondents are employers in concrete forming construction, their employees affected by this application are employed in concrete forming construction and the Agreement is a collective agreement pertaining to concrete forming construction. Counsel argues further that concrete forming construction bargaining units are unique and have a special standing which, when represented by certain local unions of the Labourers' International Union of North America (LIUNA), relate to all sectors of the construction industry and are outside of the parameters of the province-wide bargaining provisions of the Act which apply to the ICI sector of the construction industry. That special standing, he argues, results from the fact that the Minister's designation order made pursuant to what is now section 139(1) of the Act naming LIUNA and its Ontario Provincial District Council as the employee bargaining agency for construction labourers employed in the ICI sector specifically excludes qualified local unions of LIUNA from the order and its effects. Moreover, counsel claims the Board recognized this special standing in its decision in *Matterhorn Construction (Hamilton) Limited*, [1981] OLRB Rep. Sept. 1276, at paragraphs 6 and 7, when it found that Labourers' Local 183, when representing or seeking to represent employees in concrete forming construction, was neither an affiliated bargaining agent nor a trade union represented by an employee bargaining agency, a finding which relied on the express exclusion in the Minister's designation order referred to above.

6. Consideration for the unique nature of concrete forming construction bargaining units and the special standing given to those units, counsel submits, should cause the Board to follow its long-standing policy respecting displacement applications for certification described and affirmed in the Board's decision in *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734, at paragraph 13. Counsel further submitted that the same consideration is reason for the Board

not to follow the holding in its decision in *Clarence H. Graham Construction Limited*, [1981] OLRB Ref. Sept. 1195, at paragraphs 6, 7 and 8, that the Board's policy delineated in *Duron, supra*, has application only to the extent that it satisfies the requirements of what are now subsections 1 through 4 of section 144 of the Act.

7. According to counsel, the Board's displacement policy applied to this application would make the appropriate unit one comprised of all construction employees employed by the respondents in the Province of Ontario. While that would be the appropriate unit, it is not one for which the Carpenters could be certified, counsel contends. In so doing he is relying on the fact that the Carpenters have decided that this application is one which relates to the ICI sector, consistent with the Board's decision in *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729, and since the Carpenters are an affiliated bargaining agent of the carpenters designated employee bargaining agency, they are limited to a bargaining unit which would be appropriate under section 144(1) of the Act. Pursuant to the Board's decisions in *Graham Construction, supra*, and *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692, counsel further contends that the only appropriate unit for the Carpenters is one described in terms of carpenters and carpenters apprentices employed in the ICI sector and all other sectors of the construction industry. Thus, counsel submits, even if the Board decides not to require the Carpenters to represent all of the employees presently represented by the Labourers, which would be the result of applying the Board's displacement policy, the unit sought by the Carpenters which would include all employees employed by the respondents in all other sectors would not be appropriate. The Board, in counsel's opinion, made that determination in its decisions in *Graham* and *Ninco, supra*, notwithstanding the reference to "...all other employees. . ." in section 144(1) where the section deals with those employees in the appropriate unit who would be outside of the ICI sectors. Those decisions, counsel argues, make it clear that section 144(1) mandates the Board to find a single appropriate bargaining unit notwithstanding the provisions in section 144(2) for two certificates to be issued, one confined to the ICI sector and the other "...in relation to all other sectors. . .".

8. Counsel for the respondents endorsed and enlarged on the alternative position of counsel for the interveners. The thrust of their arguments was the same and it will suffice at this stage in the decision to say that the argument of counsel for the respondents, while relying on the same authorities, dealt more explicitly with the application of those authorities to the specific circumstances of this application.

9. Counsel for the Carpenters disputes the interveners' claim that concrete forming construction bargaining units are unique or have any special standing at all and certainly none which would be grounds for supporting the interveners' claim that the Board's displacement policy should or could take precedence over the requirements of section 144(1) of the Act when an application relates to the ICI sector, as this one does. Counsel claims that the Board's decision in *Matterhorn, supra*, is the only reported decision in which the Board has given effect to the concrete forming construction exclusion from the labourers employee bargaining agency designation order. Even in that decision, counsel claims, the Board would not give Labourers' Local 183, the applicant in the case, the unit in the Agreement herein. In fact the *Matterhorn* unit was limited to employees engaged in concrete forming on residential building projects in the Board's geographic area #8. More particularly, he argues the Board has not made a finding under the Act that the concrete forming unit which the interveners claim is described in the Agreement is an appropriate unit. Furthermore, counsel questions whether the Board has ever found a concrete forming unit to be appropriate except in Board area #8 and notes that the employees affected by this application are employed in the North Bay area, Board area #16.

Counsel contends that the Board has not found a concrete forming unit to be appropriate either on a province-wide basis or in North Bay.

10. All of the foregoing notwithstanding, counsel contends that the Carpenters are entitled to “carve out” from the bargaining unit in the Agreement their traditional building trade of carpenters and carpenters’ apprentices. Counsel relies on the Board’s decision in *Duron Ottawa Ltd.*, [1983] OLRB Rep. Oct. 1639.

11. With respect to the issue of whether the Carpenters are entitled to apply to represent a bargaining unit comprised of all carpenters and carpenters’ apprentices employed by the respondents in the ICI sector of the construction industry, and all employees employed by the respondent in all other sectors, counsel offered the following argument. First the Carpenters acknowledge that they cannot apply for certification in the ICI sector for any unit other than carpenters and carpenters’ apprentices. Second, no similar limitations apply with respect to all other sectors of the construction industry because the phrase “. . . together with all other employees in at least one appropriate geographic area. . .”, which refers to employees who would not be in the ICI sector, indicates that it is not necessary for the “non-ICI” part of the unit to mirror the “ICI” part. In other words, the phrase would accommodate a bargaining unit described in terms of carpenters and carpenters’ apprentices in the ICI sector together with employees in the carpenters’ and other trades in all other sectors. Counsel submits that the Board has not dealt previously with the issue that the “non-ICI” part of the unit in an application under section 144(1) does not need to mirror the “ICI” part in order to be appropriate under that section. He contends that the *Graham* and *Ninco* decisions, *supra*, on which the respondents and interveners are relying, as well as the Board’s decisions in *Manacon Construction Limited*, [1983] OLRB Rep. Mar. 407 and *Manacon Construction Limited*, [1983] OLRB Rep. July 1104 were not required to address that specific issue. The applicant in the *Graham* decision was the Carpenters and in the *Manacon* decisions the applicant was General Workers Local 1030 of the Carpenters.

12. In the alternative, if the Board finds that section 144(1) will not accommodate the bargaining unit sought by the Carpenters, counsel submits that the Board can treat the application as though the Carpenters were applying for two separate units. One unit would be pursuant to section 144(1) and comprised of all carpenters and carpenters’ apprentices employed by the respondents in the ICI sector in the Province of Ontario and in all other sectors in Board area #16. The other unit would be pursuant to section 144(3) and comprised of all other employees, excluding carpenters and carpenters’ apprentices, employed by the respondents in the construction industry, excluding the ICI sector. Counsel asserts that treating the application in that manner would be analogous to the Board’s practice in appropriate circumstances of issuing two certificates, one for a unit of full-time employees and the other for part-time employees, where the application originally described a single, all employee type of unit.

13. In the further alternative, counsel contends that the very least the Carpenters are entitled to is a unit comprised of all carpenters and carpenters’ apprentices employed by the respondents in the ICI sector of the construction industry in the Province of Ontario and in all other sectors in Board area #16.

14. Sections 144(1), (2) and (3) are relevant to these issues and provide as follows:

144(1) An application for certification as bargaining agent which relates

to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
 - (b) one or more affiliated bargaining agents of the employee bargaining agency, on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees and at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.
- (2) If on the taking of a representation vote more than 50 per cent of the ballots are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.
- (3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

15. Having reviewed and considered the submission of the parties on the two issues, the Board draws the following conclusions.

16. There is no dispute between the parties that this is an application made pursuant to section 144(1) of the Act in spite of the diversity and novelty of their arguments.

17. That being the case, the holding in the *Graham* decision, *supra*, subsequently confirmed in the *Duron Ottawa* decision, *supra*, that the requirements of section 144(1) of the Act take precedent over the Board's displacement policy, applies to this application. Counsel for the interveners has argued that the Board should apply its displacement policy to this application, the *Graham* and *Duron Ottawa* decisions notwithstanding, because of the unique nature of concrete forming construction units and the special standing counsel claims has been granted to them by the Board. That policy was fully discussed in the Board's 1976 decision in *Duron Ontario*, *supra*, but the succinct summary of it in *Duron Ottawa*, *supra*, is entirely adequate for this decision:

"...even in cases involving the construction industry, the Board in displacement cases has always determined the bargaining unit under section 6(1)

of the Act, and the applicant was required to take all employees in the existing bargaining unit.”

Even if the Board had the option under section 144(1) to follow its displacement policy, it would not for two reasons. First, the Board agrees with counsel for the Carpenters that the Board has not granted the special standing to bargaining units in concrete forming construction asserted by counsel for the interveners. Second, it would be disruptive to the provincial bargaining scheme for the same reasons given in the *Graham* and *Manacon* decisions, *supra*, if the Carpenters were required to represent in the ICI sector trades other than carpenters. Therefore the Carpenters’ will not be required to represent all of the employees in the existing agreement without regard for their trade classifications.

18. Of course that still leaves the question of what employees the Carpenters will be required to represent; in other words, what is the appropriate bargaining unit. The facts of this case are quite analogous to those in the *Duron Ottawa* case, *supra*. In that latter case, the applicant was a trade union which is an affiliated bargaining agent of the employee bargaining agency for the cement masons’ building trade and was seeking to represent certain employees who, at the time, were represented by a local of the LIUNA under the labourers provincial agreement. The provincial agreement described a bargaining unit which included “. . . employees engaged in cement finishing, water-proofing or restoration work. . .”, a description which includes cement masons and labourers. The applicant had applied to represent cement masons only. The incumbent labourers’ union argued that the applicant should be required to represent labourers as well. In the instant case we do not know precisely the trade classifications represented by the interveners because the Board has accepted the agreement of the parties to first hear and decide the legal issues set out above with respect to the appropriate unit. The agreement, however, includes classifications which could include carpenters as well as other trades. Therefore, if the unit includes carpenters, it could also be broader than carpenters. So for the purpose of this decision, the Board assumes, without finding, that the bargaining unit in the agreement includes carpenters and other trades.

19. The Carpenters herein want bargaining rights in the ICI sector for carpenters, but not any other trades, employed by the respondent. That was the applicant’s position with respect to cement masons in the *Duron Ottawa* case, not just respecting the ICI sector but all other sectors as well. The Carpenters, on the other hand, also want to represent in all other sectors any other trades included in the agreement’s bargaining unit. In spite of that difference in the two cases, the Board finds instructional for this case, the reasoning and conclusions of the Board in *Duron Ottawa*. The extract set out below begins right after the quotation above summarizing the Board’s displacement policy:

“4. In the *Clarence H. Graham Construction Company Limited* case, [1981] OLRB Rep. Sept. 1195, the Board noted that such a policy concerning construction industry bargaining units was probably in conflict with the policy implicit in section 144(1) of the Act dealing with applications for certification in the construction industry. The *Clarence H. Graham Construction Company Limited* case was not a displacement case. This case, however, is. Indeed, it falls squarely within the principles referred to in the *Duron Ontario Limited* case referred to above. Thus, the question which arises is whether in view of section 144 of the *Labour Relations Act* the applicant in the present case should be required to take a bargaining unit of cement masons and construction labourers. That is, the unit represented

by the current incumbent, or whether the applicant can seek to represent a unit only consisting of cement masons. It is clear that the applicant does not seek to represent construction labourers, and is only seeking to represent cement masons. Section 144(1) of the Act reads as follows:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 177 shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by the provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

(emphasis added)

It is our view that the bargaining unit sought by the applicant, namely, a bargaining unit of cement masons correctly describes, in generic terms, the employees who would be bound by its provincial agreement. Further, to require the applicant to take construction labourers would in fact require the applicant to assume bargaining rights for employees who would not be bound by its provincial agreement. As the Board noted in the *Clarence H. Graham Construction Company Limited* case, this would lead to the mischief of establishing bargaining rights for trade unions bound by provincial bargaining with respect to employees who would be outside the realm of provincial bargaining. As the Board noted in paragraph 11 of the *Clarence H. Graham Construction Company Limited* case:

‘It should be noted that section 131a(1) [now section 144(1)] says ‘shall include all employees who would be bound by a provincial agreement’. Normally this would imply that the Board has the power to include employees other than those covered by the provincial agreement. In the present case, however, this becomes a matter of including in a provincial bargaining unit or series of bargaining units employees covered by the regime of provincial bargaining, together with employees outside the provincial bargaining regime. Clearly, subsection 3 and subsection 5 of section 131a [now section 144] deal with matters relating to employees outside the regime of provincial bargaining and we propose to limit the appropriate unit in this case to only those covered by the regime of provincial bargaining. In so doing we are of the view that this is consistent with the provisions of the Act relating to the provincial bargaining. To certify the applicant in the present case for employees in the industrial, commercial and institutional sector in the construction industry, but

outside the scheme of provincial bargaining, would create representation rights for trade unions within that scheme for employees outside the regime of provincial bargaining. Such representation would clearly be disruptive of the overall scheme contemplated in sections 125 [now section 137] to 136 [now section 151].’

We, therefore, are of the view that the appropriate bargaining unit is, as found in our previous decision, described in terms of all cement masons and cement masons’ apprentices.

5. Before leaving the matter of the appropriate bargaining unit, however, it is perhaps necessary to comment on the Board’s decision in *Ninco Construction Limited*, [1982] OLRB Rep. Nov. 1692. In that case, the Board, commenting on the *Clarence H. Graham Construction Company Limited* case, also dealt with the matter of the type of employees affected by this application:

‘5. The contention of the applicant is that in the *Clarence H. Graham* case the Board misinterpreted the relevant provisions of the Act and wrongly concluded that it was prohibited from certifying an affiliated bargaining agent for employees falling outside the scope of the relevant designation. Accordingly, contends the applicant, the Board should not follow the reasoning set forth in that case. We incline to the view that section 144 of the Act does not permit an affiliated bargaining agent to apply to represent employees in the ICI sector who are outside the scope of the designation affecting it. However, even assuming that the Act does not actually prohibit such a result, we nevertheless regard the unit being requested here, (namely one which includes employees both within and outside the regime of provincial bargaining such that some but not all of the employees would fall under a provincial agreement) to be disruptive of the scheme of provincial bargaining and not appropriate for collective bargaining. The Board has a broad general authority under section 6(1) of the Act to determine the unit that is appropriate for collective bargaining. In the ICI sector this broad authority is restricted somewhat by section 144. Nothing in section 144, however, mandates that the Board include different crafts or classes of employees within the same bargaining unit or requires that employees within and outside the scheme of provincial bargaining be included in the same unit. Accordingly, even if such a unit is permitted under the Act, nevertheless the Board still retains the authority under section 6(1) to conclude that it is inappropriate. As already indicated, we view the unit being requested in this case as inappropriate. Instead, we regard the appropriate bargaining unit as one which encompasses only employees covered by the labourers’ employee bargaining agency designation and who, accordingly, would fall under the labourers’ provincial agreement.

6. At the hearing, counsel for the applicant contended that any bargaining unit fashioned by the Board should expressly include not only construction labourers but also ‘all employees engaged in cement finishing, waterproofing or restoration work’. This phrase is utilized in both

the labourers' employee bargaining agency designation and the labourers' provincial agreement. Presumably the phrase found its way into the designation because of its use in collective agreements entered into by various Ontario locals of the Labourers' International Union prior to the advent of provincial bargaining. To our knowledge, except for displacement applications where the wording had previously been utilized by the employer and the incumbent union, the Board has never recognized employees in cement finishing, waterproofing or restoration work as being one or more separate trades or classifications of employees for certification purposes. Indeed, the Board's experience is that the types of work involved can, and, have been, performed by members of more than one trade. We are not satisfied on the material before us that the Board should now begin to describe bargaining units in these terms. However in that on the application date the respondent did have employees engaged in cement finishing work, we think it appropriate to describe the bargaining unit in terms of construction labourers but to specify in a clarity note that employees performing this type of work do come within the scope of the bargaining unit. In that the respondent had no employees engaged in waterproofing or restoration work at the relevant time, we do not feel it appropriate to include a similar clarity note relating to this type of work.'

The term used in that decision, namely, "employees engaged in cement finishing, waterproofing or restoration work" includes both cement masons and labourers. That is, it is clearly broader than "cement masons". The point in the present application is that the applicant is entitled by virtue of our interpretation of section 144(1) to represent cement masons and cement masons' apprentices (the term in its designation) and need not take all employees engaged in cement finishing, waterproofing or restoration work.

20. The principles set out in *Duron Ottawa*, including those which it adopts from the *Ninco* decision, are entirely applicable to the facts of this case. Their application leaves no doubt that the Carpenters are entitled "at the very least", as counsel put it, to a bargaining unit comprised of carpenters and carpenters' apprentices in the ICI sector in the Province of Ontario and in all other sectors in Board area #16. The question is whether it is entitled to anything more respecting the trades to be included in the "all other sectors" part of the bargaining unit. It appears that the Board has not addressed that question in its reported cases, like all of the ones referred to herein, wherein it has held that an affiliated bargaining agent making application under section 144(1) of the Act must apply for a unit comprised of the trades which would be bound by its provincial agreement, in this case carpenters and their apprentices. Counsel for the Carpenters has argued that they are entitled to include trades other than carpenters in the "all other sectors" part of the unit on the two bases argued above; that is, the wording of section 144(1) provides for that result or, in the alternative, the Board should treat the application as though it were made for two bargaining units. One unit would be limited to carpenters and apprentices in the ICI sector and in all other sectors in Board area #16 and the other would be comprised of all other trades in sectors other than the ICI sector in Board area #16.

21. A plain reading of the words "...together with all other employees in at least one appropriate geographic area..." certainly accommodates what the Carpenters are seeking.

However, as the Board observed in paragraph 5 of the *Ninco* decision quoted from the *Duron Ottawa* decision, *supra*, the Board retains general authority under section 6(1) of the Act to determine the unit that is appropriate, and, although section 144 places some restriction on that broad authority, it does not mandate the Board to include different crafts or classes of employees within the same bargaining unit or require that employees within and outside the provincial bargaining scheme be included in the same unit. Therefore, even though the wording of section 144(1) allows what the carpenters are seeking, the Board still retains authority under section 6(1) of the Act to determine whether the unit would be appropriate. There are sound labour relations policy reasons why it would not be appropriate.

22. In the Board's decision in *Colonist Homes*, *supra*, it interpreted section 144 of the Act to mean that the applicant in an application under that section, and not the Board, decides whether the application relates to the ICI sector and is made under section 144(1) of the Act or does not relate to the ICI sector and is made under section 144 (3). It further interpreted section 144 to mean that it was necessary only for the application to describe the bargaining unit in terms that encompassed the ICI sector as well as other sectors and it was not necessary that there be employees at work in the ICI sector on the making of the application. In reaching those conclusions, the Board took into account the legislative history of what is now section 144 and the fact that, when first enacted, it required an application for certification in the ICI sector to be for "...employees. . . employed in the [ICI] sector. . .", and when enacted in its present form, that requirement had been dropped. That amendment persuaded the Board that the current wording of section 144(1) was intended to avoid the need in each application to make a determination as to the sectors employees are working in within the relevant Board area. The important labour relations policy served by that result is the avoidance of a significant potential for delay in the certification process. Prior to the advent of section 144, the Board had consistently rejected a sector approach to certification proceedings in the construction industry for that reason. See the Board's decision in *Lyle West Electric Limited* [1978] OLRB Rep. Nov. 999.

23. Were the Board to accept the proposition that the wording of section 144(1) would allow an appropriate bargaining unit to be described as Carpenters' counsel suggests, the Board would have to determine whether the employees who are not carpenters and carpenters' apprentices were working in the ICI sector. This would be necessary because, if the application succeeds, two certificates would issue pursuant to section 144(2). The certificate respecting "all other sectors" in Board area #16 would be described to include the other trades. For example, assume that the Carpenters were seeking a unit described as "all carpenters and carpenters' apprentices employed by the respondent in the ICI sector of the construction industry in the Province of Ontario and all carpenters, carpenters' apprentices, cement masons and cement masons' apprentices and construction labourers employed by the respondent in all other sectors of the construction industry in Board area #16". The "all other sectors" certificate in that case would be described as "all carpenters, carpenters' apprentices, cement masons, cement masons' apprentices and construction labourers employed by the respondent in all other sectors of the construction industry in Board area #16". If the certificate issued without any determination of whether the cement masons and construction labourers were working in the ICI sector and if in fact they had been working in that sector, the Carpenters would be acquiring bargaining rights which would not have been available to them had an application been made under section 144(3) of the Act in the same circumstances. Applications brought under that section must relate "...to a unit of employees *employed* in all sectors of a geographic area other than the[ICI] sector" (emphasis added). Under section 144(3), therefore, it is necessary to determine that the employees are not employed in the ICI sector. In this example,

therefore, in order to avoid the possibility of the Carpenters inadvertently acquiring bargaining rights for the cement masons and construction labourers under section 144(1) which they could not get under section 144(3), the Board would have to make a sectoral determination respecting those trades. Such a determination would be unnecessary if the unit was described in terms of carpenters alone. Describing a bargaining unit under section 144(1) which would have that result would be contrary to one of the labour relations policies underlying the Board's decision in *Colonist Homes, supra*, the very decision which has made it possible for the Carpenters, instead of the Board, to determine that the instant application relates to the ICI sector without the need of establishing that there were any carpenters employed in that sector at the time it was made.

24. Having regard to the Board's long-standing policy of avoiding sector determinations in construction industry applications, a policy which appears to have been heeded by the Legislature when it enacted the present section 144(1), and the fact that the unit proposed by the Carpenters would require the Board to make a sector determination, the Board finds that it would not be a unit appropriate for collective bargaining. Instead, the Board finds the appropriate unit to be all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors within a radius of 33 kilometres (approximately 20 miles) of the North Bay post office (Board area #16).

25. It remains for the Board to deal with the final alternative argument of Carpenters' counsel; that is the proposition that the Board treat the application as though it had been made for two separate units. The first would be the one found in the preceding paragraph to be appropriate under section 144(1). The second would be for all employees, excluding carpenters and carpenters' apprentices, in the employ of the respondent in the construction industry in Board area #16.

26. Where, as here, a building trades union seeks under the construction industry provisions of the Act to represent employees in a bargaining unit which is not its normal craft or trade, in the instant case not carpenters and carpenters' apprentices, the Board will consider the appropriateness of the unit pursuant to section 6(1) of the Act. In such cases, the unit considered by the Board to be appropriate is one comprised of all trades or classifications unrepresented by any other trade union and at work on the date of the application. See *Duron Ontario, supra*. When an affiliated bargaining agent like the Carpenters wants that type of unit, it must make its application pursuant to section 144(3) of the Act. See *Rolland Duquette Construction*, [1983] OLRB Rep. Nov. 1884. In such cases, the Board does not describe the appropriate unit in terms of "all employees", rather it describes the unit by the trades or classifications actually at work. In the instant case, if there were cement masons and construction labourers, for example, it would describe the unit in terms of all cement masons, cement masons' apprentices and construction labourers. If those were in fact the trades at work on the date of making of the application, the Carpenters would have been at liberty to apply under section 144(3) of the Act to represent those classifications in Board area #16, excluding the ICI sector. If it had the requisite number of employees as its members, it would be certified for that type of unit. What it is seeking to do is have the Board treat its application as though it had requested one bargaining unit which would be appropriate under section 144(1) and another which would be appropriate under section 6(1) as applied to applications made under section 144(3). Were the Board disposed to grant the Carpenters' request, a plain reading of sections 144(1) and 144(2) makes it clear that section 144(1) describes *one* bargaining unit

and the question of whether an applicant has the requisite membership support is determined amongst the employees in that single unit. The Carpenters could not rely on the membership support of or the ballots cast by the employees in that unit for the proposed second unit. It would have to demonstrate the requisite membership support amongst the employees in the proposed second unit to have been entitled to the pre-hearing representation vote and, if it was to be certified, a majority of the ballots cast by the employees in that unit would have to have been cast in favour of the Carpenters.

27. The Board frequently processes applications outside of the construction industry provisions in which a single, all-employee type of unit is being sought. If there are full-time and part-time employees in the unit, the Board may find that part-time employees should be excluded from a unit of full-time employees because of a separate community of interest. When that happens, if the applicant seeks also to represent the part-time employees, the Board will find a second appropriate unit comprised of all part-time employees. It does so without requiring the applicant to file a fresh application. Applications outside of the construction industry are made pursuant to section 5 of the Act and the appropriate bargaining unit is determined pursuant to section 6. Section 6 gives the Board broad discretion to determine the appropriate unit and obviously has been broadly construed by the Board in order for it to find, in appropriate circumstances, more than one appropriate unit in a single application. As the Board stated in its decision in *Parnell Foods Limited*, [1969] OLRB Rep. April 38, on page 40:

“ . . . if the Board finds there is more than one unit of employees appropriate for collective bargaining then in the interests of industrial peace it has a wide discretion in choosing a unit or units that it will certify.”

While that broad discretion has been restricted somewhat by section 144(1) of the Act respecting applications relating to the ICI sector, there is nothing in section 144(1) which would prevent the Board from finding more than one appropriate unit in proper circumstances, so long as one of the units found by the Board to be appropriate fulfills the mandate of section 144(1) with respect to the “ . . . employees who would be bound by a provincial agreement. . . ”.

28. There are some sound labour relations reasons in this application for doing as counsel for the Carpenters requests. Most importantly, the necessary findings with respect to the appropriateness of the section 144(1) unit of carpenters and the number of employees in the unit who were members of the Carpenters on the making of the application could be made without delay and, therefore, without need to delay the counting of the ballots or the issuing of a certificate if a majority of the ballots cast have been cast in favour of the Carpenters. If there is an issue of whether the other trades were working in the ICI sector, it will have to be resolved before a second appropriate unit could be found. But that would be a severable issue and would not interfere with disposing of the application as it relates to the carpenter unit. In the context of an application for certification where there has been no request for a pre-hearing vote, it would mean that the application, insofar as it relates to the section 144(1) unit, could be fully and finally determined without delay pending the resolution of any problem with respect to the second bargaining unit. By treating an application in this manner when an affiliated bargaining agent is seeking to represent its designated trade in the ICI sector and something more in all other sectors, multiple proceedings would be avoided as would the delay attendant upon them. It would assure also that all related bargaining unit issues would be dealt with simultaneously, as a whole and by one identically constituted Board. There is also uncertainty in the instant case as to the trades at work on the date of the application and whether the persons at work were performing work of the carpentry trade. It is possible, therefore, that

the Carpenters could have conducted their organizing campaign amongst persons whom they considered to be performing carpentry work who, in fact, were not performing such work at the times material to the application. If that were to be the case, there would be no unit of carpenters and carpenters' apprentices available. Were the Board to deny the Carpenters' request for the second bargaining unit, the Carpenters' would lose the right to represent persons who are members of the Carpenters unless a fresh application could be successful. In all of these circumstances, the Board would be disposed to grant the Carpenters' request.

29. There may be other sound labour relations reasons in other instances for the Board applying the same policy, and there may be cases where the Board would decline to apply the policy. Obviously, decisions whether to apply the policy would have to be made on a case by case basis. Some may see the application of this policy to applications made under section 144(1) of the Act as having a disruptive effect on traditional trade jurisdiction by inviting more trade unions to cross traditional trade lines. In the Board's experience, those lines are not as clearly defined as some persons would like to believe. What is more significant, however, and while the Board does not wish to do anything to increase the opportunity for disputes over trade jurisdiction, the Act does not give to any trade union a monopoly respecting the representation of any unit of employees. See *Duron Ontario, supra*, at paragraph 13, wherein the Board also observed as follows:

“... In our opinion, the root cause of the arguments over the appropriateness of the bargaining unit is grounded in a view that trade unions in the construction industry should not as a matter of principle cross craft lines in their organizing activities. Many arguments may be made in support of this view. Such a point of view, however, is best debated within the ranks of trade unions rather than before this Board...”

30. Having regard for all of the foregoing, if the respondent employed carpenters on the date of this application made pursuant to section 144(1) of the Act, there would be an appropriate unit described in terms of all carpenters and carpenters' apprentices in the employ of the respondent in the ICI sector in the Province of Ontario and in all other sectors within a radius of 33 kilometres (approximately 20 miles) of the North Bay post office. If the respondent employed on the date of making of the application classifications other than carpenters in sectors other than the ICI sectors, whether or not carpenters were employed, there would be an appropriate unit described in terms of all other sectors within a radius of 33 kilometres (approximately 20 miles) of the North Bay post office, and the classifications or trades of the persons employed who were represented by the interveners pursuant to the Agreement or who were not represented by any other trade union.

31. The Registrar is directed to list this matter for hearing on the issues remaining. The parties are directed to meet and attempt to agree on how to proceed with those issues. The applicant, accordingly, is to advise the Registrar of the results of their meeting.

0560-84-U John Salter, Complainant, v. Graphic Communications International Union, Local 466, Respondent, v. B. C. MacDonald, Manager of Industrial Relations, **Dixie Canada Inc.**, Intervener

Duty of Fair Representation — Unfair Labour Practice — Collective agreement requiring consideration of seniority as well as ability and experience in lay-off situations — Union favouring more senior employee — Not considering complainant's greater experience and ability — Policy based on best interests of whole unit — No breach

BEFORE: S. A. Tacon, Vice-Chairman.

APPEARANCES: *C. J. Abbass and John Salter for the complainant; James K. McDonald and Jim Elliot for the respondent; B. C. MacDonald for the intervener.*

DECISION OF THE BOARD; September 19, 1984

1. The name of the respondent is amended to read: Graphic Communications International Union, Local 466.

2. This is a complaint alleging contravention of section 68 of the *Labour Relations Act*. The complainant asserts that the respondent union violated this duty of fair representation when the complainant's grievance was dropped at the fourth stage of the grievance procedure and was not carried to arbitration.

3. Much of the complainant's testimony was not disputed. The complainant, an experienced first pressman, was hired by the company in 1974 as a five-colour pressman. At that time, there were seven five-colour pressmen in the department but only two besides the complainant at the top of the wage classification. During slow periods over the years, other five-colour pressmen were demoted to lower positions for a time but the complainant always retained his position. In the Spring of 1982, the complainant was to be "bumped" by a more senior five-colour pressman, K. Moore, but, as the complainant was Plant Chairman at that time, he exercised his "super-seniority" under the collective agreement and retained his position. In the Fall of 1982, however, the complainant, having resigned his union position, was bumped by K. Moore. A grievance was filed by the complainant but was dropped after the third stage. The complainant was returned to his position as five-colour pressman some time later but, in the Fall of 1983, he was again bumped by K. Moore. It was the respondent union's decision not to proceed to arbitration with this grievance which led to the complaint which is now before the Board.

4. The basis for the complaint lies in the language of the collective agreement dealing with seniority. The relevant section reads as follows:

Section 15 (4): Promotions, transfers, demotions, lay-offs and recalls from lay-offs, shall be made on the basis of seniority as between all individual employees where, in the judgment of management, the qualifications of such employees, including ability and experience, are equal. The Shop Committee shall be informed by Management of any changes in the status of Union members and shall be given the opportunity to present its views on the changes. In any case, however, conclusions regarding the relative abilities

of employees shall rest with the Company subject to the provisions of the grievance procedure of this Agreement.

It is not disputed that this language has remained unchanged for a number of years. The complainant testified that he regarded this provision as meaning seniority and ability and experience were all factors to be considered and seniority only wins if the ability and experience of two employees are equal. Since, in the complainant's view, he was the most skilled of all the five-colour pressmen, he should have retained his position and K. Moore should have been demoted. It was the respondent union's failure to press for the "ability and experience" aspect of the seniority language which, the complainant asserted, violated the duty imposed by section 68 of the Act. The complainant acknowledged, though, that it was the company, not the union, which assessed the ability and experience of the employees.

5. In support of his position, the complainant testified that, when he was hired, there was an "ability list" in the department on which he was ranked third, ahead of four other employees, including K. Moore. In the complainant's opinion, this ability list was used to determine who would be bumped up until this grievance. The complainant's grievance in the Fall of 1982 had been denied because there was no proof of his greater ability. The complainant pointed to one paragraph in the company's stage two response which stated:

The results of the study did not indicate that Mr. Salter was the best five (5) Colour Offset Pressman, and indeed the study indicated that all the gentlemen involved scored about the same in the sample studied.

The complainant testified, however, that there were production records instituted after that grievance which established that he was at least better than K. Moore. The respondent union's refusal to examine these records in assessing the merits of his grievance was further indication that the union had acted contrary to section 68 of the Act.

6. The complainant had several conversations at various times regarding his grievance with his supervisor, M. Palmer, R. Cairns (plant manager and, later, president) and various union officers, including T. Griffin (shop steward), D. Williamson (plant chairman) and J. Elliott (business agent). The complainant also testified that J. Elliott clearly indicated that the union's position was that seniority should be the governing factor when two employees were at the top rate of the classification. Moreover, this had been the union's position with respect to section 15(4) of the collective agreement since the 1980 negotiations, when the complainant had been on the union negotiating committee.

7. The complainant asserted that, in the past and since the 1980 negotiations, the respondent union had supported the notion of "ability and experience", rather than seniority, in deciding whether to proceed to arbitration with other grievances. Specifically, the complainant cited the Hewitt-Wallawski grievance and the Wagstaff-Amaro and Wagstaff-Bishop grievances.

8. The complainant, as Plant Chairman, was personally involved in the Hewitt-Wallawski grievance during the first stages. The complainant recollected that the company had informed Hewitt that he would have to agree to remain in the position for about two weeks; Hewitt refused and the less senior man, Wallawski, was given the position. However, in the complainant's view, since the collective agreement did not stipulate a time period for the position "bumped into", the company was really citing this excuse to keep the person (Wallawski) they considered more

experienced and capable. The complainant, though, considered Hewitt to be the most senior *and* to have the greater ability and experience. However, the complainant could not recollect why the union dropped the Hewitt grievance at the fourth stage; he did not consider the grievance a “big issue” and stated he had been informed by the steward that J. Elliott had just dropped the grievance without giving reasons.

9. With respect to the Wagstaff grievances, the complainant stated that the less senior employee, Wagstaff, remained in the position while two others were denied the job on the clicklock machine. All three were at the top rate on the clicklock. The complainant did acknowledge, though, that the company’s position in the grievance was that the other two were not capable of running another piece of equipment while Wagstaff was. The complainant stressed however, that the job was scheduled as just the clicklock machine.

10. On cross-examination, the Beamish-Neil grievance was raised. The complainant agreed that he had been involved with this grievance, as Plant Chairman, as well. Further, the complainant agreed that that grievance was similar to his grievance in that seniority versus ability and experience was at issue. During the grievance procedure, the company recognized that Beamish, the more senior employee, should have received the position. The complainant conceded that the union had taken the position throughout the grievance, that seniority should govern since both men were at the top rate of the classification. However, in the complainant’s view, while he was surprised at the successful outcome of the grievance, he considered that the company felt that it could not be proved that Neil possessed more skill and ability than Beamish.

11. Finally, the complainant conceded that, in the Viveiros grievance, the union had argued for seniority over ability and experience.

12. After the respondent union decided to drop the complainant’s grievance, the complainant testified that he appealed that decision to the Union Executive Board. Both he and J. Elliott submitted written statements outlining their respective positions; the complainant received a copy of J. Elliott’s submission. Moreover, the complainant spoke at the Executive Board hearing. The Executive Board’s decision (communicated to the complainant by letter from J. Elliott) reads, in part:

After careful consideration of all facts brought forward by you both verbally and by your letter dated April 10, 1984, along with my letter they have concluded that seniority must prevail when two members are equal to each other by both being at the top rate of their classification.

They realize that in your case this is of little help to you, but they hope that you would recognize that all unions push for seniority first and that it is the companys [sic] responsibility to use ability never ours.

They would also like to thank you for the time and effort by you when you served as Plant Chairman and do regret that they could not help you in resolving your problem.

13. The Board has not attempted to recount the complainant’s testimony in exhaustive detail. Similarly, the testimony of the other witnesses is abbreviated to the relevant statements.

14. The next witness for the complainant was M. Palmer, an employee of some forty years and currently Printing Superintendent. M. Palmer testified that there had always been a seniority list and, additionally, in the pressroom, an ability list until about five or six years ago. M. Palmer, as union chairman at the time, had helped introduce the ability list. He could not recall whether other, more senior pressmen had been bumped by the complainant during the years on the basis of the ability list. In his view, the complainant has more experience and more ability, based on this experience, than K. Moore. He had been asked to review jobs in the pressroom to see if output could be compared. However, he indicated that the records merely measured output, not quality. Further, he stated that he didn't think the production records showed any significant differences (although the complainant's output was always good) but acknowledged that the union had not asked for the records in connection with the complainant's grievance. M. Palmer outlined the steps to the top rate. Apparently, while the company has discretion to approve the progress to the next rate, in practice, the steps are usually automatic every six months, until the top rate is reached.

15. M. Palmer testified that he told the complainant that this grievance has been fought about four times and the union keeps winning; the company, then, had decided to stop fighting and go by the clock number (seniority) once the top rate is reached. That is, in M. Palmer's view, it has become the union's practice, since about 1978, to file a grievance if the less senior employee had been given the job. After assessing the costs of arbitration and since there were no reliable tests to distinguish ability and experience among top-rated employees, management had concluded that, if the union really wanted to lean a little toward seniority, the company was prepared to go along with the union's position in these circumstances. However, there was no verbal agreement on this point between the company and the union. In M. Palmer's opinion, seniority became the governing consideration where two employees were at the top rate of the classification about two or three years ago; he referred to the Lupson-O'Callahan and the Beamish-Neil grievances. M. Palmer also told the complainant that he (the complainant) had fought for seniority in the Beamish grievance.

16. J. Elliott testified that he had been President of Local 466 for five years and business agent for ten years; during the last four years he serviced the American Can plant. He and Ed Hodges were full-time employees of the local, which comprised about 2,300 members. J. Elliott indicated he had had dealings with the complainant when the latter was Plant Chairman and during the complainant's grievances. It was normal procedure for the early stages of a grievance to be handled by the relevant steward and the Chapel Chairman (i.e., Plant Chairman) and for J. Elliott to be involved at the fourth stage.

17. At the fourth stage of the complainant's grievance, J. Elliott stated that the grievance committee, consisting of Williamson (Plant Chairman), Griffin (steward), Lane (steward) and Smith and another representative from the machine shop and himself, considered the grievance (including the company's responses to the previous steps in the grievance procedure), decided there was nothing more the union could do for the complainant and dropped the grievance. According to J. Elliott, the grievance was dropped because the individual who had bumped the complainant had more seniority and both were top-rated. If the complainant's grievance had been successful, that other employee, K. Moore, would have been demoted. Furthermore, it was the union's position that the "skill and ability" aspect of article 15(4) of the collective agreement was for the company's benefit, that the union would like to have taken this out entirely and just have seniority as the ruling factor. In Elliott's view, the grievance committee would not be in a position to judge the relative skill and ability of all employees on the three shift operation at the plant. Moreover, in the Beamish-Neil grievance, the union had specifically

argued for, and won, the principle that seniority should govern where two employees were top-rated. The complainant, J. Elliott, Lane and Smith comprised the grievance committee which asserted that union position in the Beamish-Neil grievance. From that point, the company had recognized the union's argument on this issue, although this was never put in writing or even amounted to a verbal agreement. J. Elliott testified that the union had asserted the "Beamish" grievance principle in at least two other grievances in the cutting and creasing department; these grievances were slated for arbitration when the company settled on a "without prejudice" basis, although paying the grievors all lost wages. Thus, in J. Elliott's view, proceeding to arbitration with the complainant's grievance would have "shot the Beamish principle out the window" and placed the union in the position of arguing for "skill and ability" while the company would have been supporting "seniority". That is, the normal roles of union and management would have been reversed. In J. Elliott's opinion, seniority is the backbone of any union, a right to be guarded jealously and fought for as much as possible.

18. J. Elliott agreed that he and the complainant had submitted written appeals to the Executive Board and that, upon being advised of the Executive Board's decision, he had informed the complainant in writing. Finally, J. Elliott testified that the complainant had not attended the submission meeting of the membership, at which members could propose changes in the collective agreement for consideration by the negotiating committee, to press for his interpretation of article 15(4) or for strengthening the "skill and ability" aspect of the article.

19. On cross-examination, J. Elliott stated that he had talked with the complainant before the fourth stage meeting but that the complainant had not mentioned the production records. However, even had he known about the records, he would not have asked for those records nor would his position on the grievance have changed, i.e., seniority should be the governing factor since both employees were top-rated. J. Elliott reiterated his view that he would prefer seniority always to be the governing factor but that every collective agreement has some "skill and ability" aspect to a seniority clause and management would never completely give up that point. J. Elliott testified that he had told the complainant, when the latter had exercised his superseniority to avoid being bumped, that, if he ever came out from under the umbrella of the superseniority, he would be vulnerable to bumping by more senior employees. When the members urged dropping of the superseniority clause at the submission meeting in June, 1982 and the complainant resigned as Plant Chairman, J. Elliott said that he had urged the complainant not to resign because many union negotiating proposals were not accepted by the company and, thus, the complainant should remain in his position at least until the clause was changed. J. Elliott added that the superseniority clause had, in fact, been restricted to layoff whereas formerly it had protected against both layoff and demotion.

20. Also on cross-examination, J. Elliott stated that the grievance committee reached its decision by looking at the replies from the company to the earlier grievance stages and previous grievance decisions and discussing the complainant's grievance amongst themselves. With respect to the complainant's ability, J. Elliott testified that the grievance committee felt the other man was equal to the complainant and, further, if the company had considered the complainant superior, the company would have relied on the "skill and ability" aspect of article 15(4) to retain the complainant while demoting K. Moore. Thus, it was management which should have asserted the complainant's case in this instance, not the union. J. Elliott stated that he recommended that the complainant's grievance be dropped but that, if the committee had wished to proceed, the grievance would have gone to arbitration. In that event, J. Elliott would not have argued the grievance but would have referred the grievance committee to the union's lawyers. However, the committee voted unanimously to abandon the grievance. J. El-

liott commented, though, that the committee recognized that the demotion resulted in the complainant losing about \$280 per week in wages.

21. J. Elliott acknowledged that this was an unusual grievance in that the union usually gets grievances alleging violation of seniority rights, not “skill and ability”. However, he said he recalled one grievance in Alcan where an employee wanted to assert “skill and ability”; the individual appealed to the Executive Board but the grievance was dropped. Finally, in J. Elliott’s view, the complainant should have presented his position on article 15(4) to the submission meeting.

22. D. Williamson testified that he has been an employee of the company for eleven years and served as Chapel Chairman for two years. As Chapel Chairman, he is involved in all steps of the grievance procedure. He stated that the grievance committee would normally meet a few minutes before the stage four meeting with the company. With respect to the complainant’s grievance, he stated that he, Elliott, Griffin and whatever other stewards were available, met to discuss this grievance just before the fourth stage meeting; other grievances were discussed at this same time and the meeting lasted about fifteen minutes. Usually, J. Elliott would tell the committee whether a grievance should be dropped or proceed to arbitration. In this grievance, D. Williamson said the information regarding the grievance was given to J. Elliott. D. Williamson stated he had also discussed grievances generally with J. Elliott before the grievance committee meeting but could not recall this grievance specifically. As to the grievance committee meeting itself, D. Williamson could not recall details of the discussion, except that both he and T. Griffin had agreed to drop the complainant’s grievance. If he had wanted to proceed with the grievance, however, it would have gone to arbitration. D. Williamson conceded that the union had not requested the production records from the company. He added that the union had never requested such records in any grievance because the records were not needed for seniority calculation; moreover, the union had no input into the records, nor did he feel that the records were proof that one individual was better than another if both were top-rated. This was the first grievance which asserted skill and ability over seniority in the time in which D. Williamson had been Chapel Chairman. D. Williamson stated that it was his responsibility to tell the complainant that the union had decided to drop the grievance, but that he could not recall when or even whether he had so informed the complainant.

23. As to the earlier stages, D. Williamson’s recollection was even more sketchy. At stage one, the meeting would have been between the complainant and the steward for the union and the supervisor. At the second stage, D. Williamson couldn’t recall the meeting itself but testified that he would have asked about the alleged discrimination, since the complainant’s written grievance had used this terminology. At the third stage, again, he could not remember the discussion but stated that, while there was nothing in the grievance he could fight for, he would not have dropped the grievance since the union would automatically take all grievances to the fourth stage. Finally, D. Williamson asserted that he considered that the skill and ability aspect of article 15(4) was in the collective agreement to benefit the company, not the union. In his view, seniority should prevail among employees at the top rate.

24. The complainant called one witness, T. Griffin, in reply. T. Griffin, an employee for nine years, was a second pressman and steward for the pressroom department. He could not recall discussing the grievance with the complainant before the complainant put the grievance in writing but believes such a discussion took place. Nor could he remember the details as to who actually bumped the complainant, although he said he would have been aware of the details at the time. Again, T. Griffin could not remember the discussions at the various stages, except

that the meetings took place and followed the usual procedures. Even the grievance committee meeting before the fourth stage meeting with the company was sketchy. T. Griffin recalled asking J. Elliott what course the union should take and J. Elliott's reply that the union should go for seniority as they always had and that he agreed. That is, he did not doubt that the union had made the correct decision in dropping the grievance, in favouring seniority over ability amongst top-rated employees. T. Griffin could not specify who attended that grievance meeting, perhaps 3, 4 or 5 individuals. All present, however, agreed to drop the grievance, although he could not have characterized the matter as a vote but rather as a consensus. He stated that there was no written summary of the grievance presented to the grievance committee, nor did he review the earlier stages since there was no need to do so. T. Griffin acknowledged that he did not see the production records, nor was there any union input in their preparation. He was aware that the department logged production records but stated that he would not trust such records since he knew that foremen occasionally changed such records to show increased efficiency.

25. T. Griffin could not recall ever dealing with a grievance asserting skill and ability over seniority. Further, he supported the union position that, at the top-rate, seniority should be the governing factor. T. Griffin stated that he was in the department when the ability list was in existence but he could not recall when the ability list was dropped. Only the complainant may have approached him asking for the reintroduction of the ability list. With respect to the Hewitt-Wallawski grievance, T. Griffin said that the union had taken the position that seniority should govern and, thus, Hewitt should get the job; he could not recall whether the company had asserted that Wallawski was the more skilled. He believed that M. Palmer met with Hewitt and himself and offered Hewitt the job if he would agree to keep the position for one week as the job was in the office and the duties could not be properly performed if the individuals shifted around more frequently. It was T. Griffin's recollection that Hewitt did not wish to give this assurance. In T. Griffin's view, the complainant was in error if he asserted that Wallawski was given the job because of his greater ability. T. Griffin also stated that he was involved with the Wagstaff grievances but could not recall any details.

26. Finally, T. Griffin testified that he had handled seven to ten grievances filed by the complainant in the last two years and that all had proceeded to the fourth stage. In his view, an individual who wished to change the collective agreement should make the proposal at a submission meeting; if accepted, the proposal would go to the negotiating committee for use in preparing the union's bargaining demands.

27. The complainant essentially asserted that the respondent had not "put its mind" to the complainant's grievance but, rather, had a predetermined position to support the "seniority" aspect of article 15(4) and ignore the "ability and experience" aspect. The testimony of some respondent's witnesses that the company should have represented the complainant was cited as support for the allegation that the duty in section 68 of the Act to represent all employees, including the complainant, had been violated. The complainant had the right to rely on all the language of article 15(4), at least until the collective agreement itself was properly amended. The complainant contended that the respondent union had the right to amend the collective agreement but asserted that there was no evidence that the appropriate procedure for so doing had been followed here. The complainant referred the Board to the decision in *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35 but argued that the case was distinguishable from the instant facts.

28. The complainant also conceded that the jurisprudence concerning section 68 of the Act established the principle that the Board should not second guess the union's decision in a particular grievance. However, the complainant argued that the evidence demonstrated that the respondent union had not assessed the merits of the complainant's grievance in this case. The testimony of D. Williamson and T. Griffin was referred to in support of the complainant's position that the grievance had received only cursory consideration. The respondent union's refusal to examine the production records was also cited as support for the union's alleged non-caring attitude. Further, the complainant asserted the respondent union was conducting a charade in processing the grievance through to step four when the union officials knew the grievance would be dropped; moreover, the only full explanation given the complainant as to why the grievance was dropped was the decision of the Executive Board in denying the appeal. The complainant also referred the Board to the cases dealing with section 68 of the Act in R. E. Brown, "*The 'Arbitratory', 'Discriminatory' and 'Bad Faith' Tests under the Duty of Fair Representation in Ontario*", [1982] 60 Can. Bar. Rev. 412.

29. Finally, the complainant conceded that the alleged verbal agreement between the respondent union and the company that seniority would govern where two employees were both top-rated had not been proven. However, the complainant argued that, if there was such an agreement, it was improper since the appropriate procedure for amending the collective agreement had not been followed. Conversely, if there was no such arrangement, the respondent union was obligated to fairly consider the merits of the complainant's grievance. The complainant stressed that, as it was not disputed that this was the first time such a grievance had been filed, it was even more important that the respondent union was required to fairly assess the complainant's grievance to avoid the "tyranny of the majority". The complainant emphasized that the remedy sought was an opportunity for the complainant to demonstrate his superior experience and ability at an arbitration hearing.

30. The respondent insisted that there had been no violation of section 68, either procedurally or substantively. The union has the right, in administering the collective agreement, to balance competing interests and had done just that. That is, as the testimony indicated, the union had preferred to protect seniority over ability and experience in deciding which of the two top-rated five-colour pressmen to support. Moreover, the preference for seniority in these circumstances had been union policy for quite some time, and further, that policy was well known to the complainant from his involvement as Plant Chairman, particularly in the Beamish-Neil grievance. The union had no obligation to examine production records in reaching its decision not to proceed to arbitration given its policy. It was also not disputed that the complainant had been given the opportunity to appeal to the Executive Board and had done so. The respondent cited several cases in support of its right to balance competing interests and preference for seniority: *Tung-Sol of Canada Ltd.*, (1964), 15 L.A.C. 161 (Reville); *Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie); and *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143 [the Gormley case].

31. The respondent also pointed out that the assessment of ability is given to the company, not the union, in article 15(4). As to the precise scope of review by the Board of a union's decision, the respondent referred to *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35 especially paragraphs 39 and 37. There was no evidence of ill will or hostility directed against the complainant personally. The union had properly directed its mind to the result or impact which proceeding to arbitration would have caused. *The Algoma Steel Corporation, Limited*, [1981] OLRB Rep. June 611 (especially paragraphs 6 and 8), *Douglas Aircraft Company of Canada Ltd.* [1976] OLRB Rep. Dec. 779 (particularly paragraph 31) and *Falcombridge Limited*,

[1983] OLRB Rep. Aug. 1303 (at paragraph 13) were cited in support of the propriety of this approach to a grievance. Whether there was a “vote” at the “pre stage four” union meeting where the decision to drop the grievance was reached was irrelevant given that the uncontradicted evidence established that all union officials were agreed that the grievance should not proceed to arbitration. Thus, the respondent submitted, as there had been no violation of section 68, the complaint should be dismissed.

32. Section 68 of the *Labour Relations Act* reads:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

33. The duty imposed by section 68 has been elaborated in a number of Board decisions. One of the most useful summaries is found in the *Gormley* decision, *supra*, at paragraph 18.

Over the years many aspects of the duty of fair representation have settled into place. The Board has repeatedly held that in order not to act in an arbitrary manner in the processing of a grievance, the union must direct its mind to the merits of the grievance and act on the available evidence. While the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a grievance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles. Additionally, a union is prohibited from processing a grievance in bad faith. An employee must not become the victim of the union's ill will such that a dislike for an individual dictates the path of the grievance rather than the merits of the grievance or legitimate concerns for the welfare of the bargaining unit and bargaining process. The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for so doing. To avoid acting in a manner that is discriminatory, the duty requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

34. The concept that a union, in directing its mind to the merits of a grievance, may legitimately consider other factors was further discussed in *Algoma Steel*, *supra*, at pages 613-615 wherein the Board cited the reasoning in *Antonio Melillo*, [1976] OLRB Rep. Oct. 613.

6. On the main branch of Mr. Noble's complaint, the Board has noted on a number of occasions that the administration of the collective agreement

is an extension of the trade union's status as exclusive bargaining agent, and that an employee has no absolute right to have his grievance arbitrated. In Antonio Melillo, [1976] OLRB Rep. Oct. 613, for example the Board commented as follows:

14. Most unfair representation complaints arise, as did this one in the context of a union decision not to carry a grievance to arbitration. It is well established that the duty imposed on a trade union by section 60 does not require it to process through to arbitration every grievance which a bargaining unit employee wishes proceeded with. An employee has no absolute right to have his grievance arbitrated (see *Gebbie and Longmoore* [1973] OLRB Rep. Oct. 519). The key assumption underlying this legal conclusion is that the settlement of disputes and grievances of employees under the terms of a collective agreement is an extension of the collective bargaining process, a process in which the interests of particular individuals must of necessity yield to the *legitimate* interest of the group.

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16. There is another group interest in the settlement of grievances which applies even to cases which might succeed at arbitration. This interest was given expression in *Rayonier and I.W.A., Local 1-217*, [1975] 2 Can. LRBR 196, a recent decision of the British Columbia Labour Relations Board interpreting a B.C. provision with language almost identical to our own. After adopting the Ontario position that an employee has no absolute right to have his grievance arbitrated, the B.C. Board stated:

"While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the need of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it: 'Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats

issues that arise in the administration of a contract as if there were always a 'right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations — a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise. . . . When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation of striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.' *Cox, Law and the National Labour Policy*, at pp. 83-88."

16. In the *Algoma Steel* case, the interpretation of the collective agreement asserted by the complainant, Mr. Noble, would have had serious consequences for a significant number of the employees. The union and the company chose not to refer the matter to an arbitrator but, rather, accepted an interpretation of the collective agreement which upheld the status quo. The Board rejected the complainant's argument that the parties, at least, should have formally amended the collective agreement to avoid a violation of section 68 [then section 60] by the union. That is, whether the parties' decision took the form of an actual amendment or merely an "agreed" interpretation of that collective agreement was irrelevant to the content of the duty of fair representation. The Board considered that the union executive had proceeded responsibly in placing the matter before a scheduled membership meeting, explaining its position, permitting a full debate on the matter (in which Mr. Noble participated) and accepting the vote of the membership to withdraw the grievance. Since the union had directed its mind to the grievance (in terms of the consequences for other employees if the complainant's interpretation was found to be correct) and had proceeded in a fair and open fashion, the Board found "nothing implicitly arbitrary, discriminatory or in bad faith in the decision to elevate the interests of one group of employees over that of Mr. Noble" (at page 616).

35. In the Board's view, the respondent did seriously consider the complainant's grievance in terms of assessing the impact proceeding to arbitration would have had on the bargaining unit as a whole. In J. Elliott's words, the principle established in the Beamish-Neil grievance would have gone "out the window". That principle — that seniority should govern when two employees were both top-rated — had been union policy for some time and had been asserted by the union in several grievances. The Board accepts the evidence of J. Elliott in this regard, particularly since M. Palmer, the complainant's own witness, also testified that the company had fought the union on this point "about four times" before deciding to accept the union's position in the interpretation of article 15(4).

36. The Board also accepts the testimony of M. Palmer and J. Elliott that there was no verbal agreement between the parties to the collective agreement to “alter” the interpretation of article 15(4). The fact that the union proceeded to arbitration with two grievances in the cutting and creasing department (although the company settled the grievances before the arbitration hearing) supports this finding. However, the Board would stress that, on the reasoning in *Algoma Steel, supra*, which this Board affirms, there would have been nothing improper in the parties agreeing, verbally or otherwise, to interpret article 15(4) to mean, in effect, that top-rated employees are deemed to be of equal ability and experience so that seniority would govern.

37. The Board also considers it significant that the complainant had known the union policy of pressing for seniority where two employees were top-rated for quite some time. The complainant had, after all, served as Plant Chairman and, hence, been involved in processing grievances. Moreover, in the Spring of 1982 the complainant had exercised his “superseniority” as Plant Chairman to retain his position against K. Moore’s greater seniority. Again, the demotion of the complainant in the Fall of 1982 also flowed from the exercise of K. Moore’s greater seniority. The complainant testified that the union had supported — or at least acknowledged — the ability and experience aspect of article 15(4) in various grievances. However, the Board does not consider the complainant’s testimony as to the rationale involved in settling or dropping various grievances (e.g. Wagstaff-Amaro, Wagstaff-Bishop, Beamish-Neil and Hewitt-Wallawski grievances) as compelling as the explanations of J. Elliott, D. Williamson and T. Griffin. Again, the Board notes that the testimony of the union officials was corroborated by M. Palmer, a member of management, at least with respect to the Beamish-Neil grievance. The Board would emphasize M. Palmer’s testimony where he stated that he expressly told the complainant that he (the complainant) had fought for seniority in the Beamish-Neil grievance.

38. The complainant stressed that the refusal of the union to examine the production records was indicative of a non-caring attitude, contrary to the duty under section 68. The Board disagrees. The production records, apart entirely from their reliability or value in demonstrating ability and experience (and the Board would comment that these are open questions) were simply not relevant to the union’s position on the central issue of deciding which of two top-rated employees should be retained and which demoted.

39. The complainant also argued that the processing of the grievance to the fourth stage had been a charade, that there had been no serious consideration of the complainant’s case. The apparent conflict in testimony in the “vote” or “consensus” method of deciding to drop the grievance was cited. The Board has no doubt that the steward and current Plant Chairman felt awkward in proceeding with the grievance in view of their position on the issue involved. However, as D. Williamson testified, all grievances were automatically processed to step four. In light of that practice, to have done otherwise with the complainant’s grievance may well have constituted discrimination. Further, continuing the grievance to step four meant that the decision would have been made by a larger group of union officials, the grievance committee. As well, the assessment and recommendation of J. Elliot, the business agent and President of the local, would have been available. The Board finds nothing improper in the union proceeding as it did. Moreover, whether there was a formal vote or less formal consensus is immaterial given the unanimity of the officers as to the appropriate disposition of the grievance.

40. The complainant suggested that, as the union witnesses (including T. Griffin) heard at least some of the testimony of the witnesses before giving evidence, the testimony was in

some way less reliable. The Board would comment that the differences in the amount of detail recollected by J. Elliott, D. Williamson and T. Griffin was considerable. However, the Board is not prepared to draw any adverse inferences from this beyond different capacities of the three to remember details of this sort of event at a date well after that event. Moreover, the minor discrepancies in the testimony directly undermine the complainant's asserted conclusion. The witnesses did not "parrot" each other or repeat the same story almost verbatim. In the Board's opinion, the differences in testimony were not significant nor do they represent more than the fact that witnesses seldom remember all — or the same — details in any situation.

41. The complainant conceded that the union's decision was not activated by any personal animosity or ill will. In *Douglas Aircraft, supra*, the Board determined that a violation of the duty not to discriminate in section 68 need not involve motive. As the Board stated at page 789:

To summarize the position of the Board, therefore, we suggest that "discriminatory" in section 60 [now 68] is designed to prevent distinctions in treatment accorded individual employees or groups of employees which are made without the support of cogent labour relations reasons. The focus of the concern is in the distinction itself rather than on the motive for the distinction. Thus a distinction made without motive may be discriminatory if it lacks the underpinning of reasonableness defined from a labour relations point of view. By the same token a seemingly reasonable distinction may become discriminatory if it is motivated by hostility.

Douglas Aircraft involved a challenge to a "superseniority" clause as a violation of section 68. (It is interesting to note that, in the instant case, the complainant benefitted, in the past, from such a clause.) This passage is cited, however, because, underlying the principle asserted by the union as the basis for dropping the complainant's grievance is the reality that the union was actually choosing to support one employee, K. Moore, instead of the complainant.

42. The question, then, for this Board is this, "Was there a rational reason, a cogent labour relations reason for the union to drop the complainant's grievance, to opt for the seniority rights represented by K. Moore as against the allegedly greater ability and experience of the complainant?". The Board uses the term allegedly given that the assessment of the complainant's ability and experience as compared with that of K. Moore was not before the Board.

43. The Board agrees and, indeed, it was not really disputed, that seniority is a critical job interest (see *Dufferin Aggregates, supra* at pages 41-43 in particular). As stated later in that decision (at page 45):

37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether

it agrees with it — rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense “reasonable” must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

44. This Board would note that the instant case does not involve what has been termed the “tyranny of the majority” but is really a choice between two individuals, although each individual “represents” a view of article 15(4) which would affect others in the bargaining unit.

The union, in opting for seniority rights as between two top-rated employees, was making a reasoned decision based on its view of the best interests of the bargaining unit as a whole. Union support for seniority clauses — or the interpretation of seniority clauses in the direction of giving greater weight to seniority over other factors — is hardly novel. Moreover, it is not for this Board to second guess the union’s choice provided the relevant factors and competing interests are considered. The union candidly characterized the other interest, i.e. ability and experience, as one which is generally supported (and sought after) by management. This assertion is also neither novel nor indicative of impropriety on the union’s part. Thus, in light of all the evidence and submissions by the parties, and in view of the principles underlying the duty of fair representation, the Board finds that section 68 of the Act has not been violated.

45. This complaint, therefore, is hereby dismissed.

0618-84-R United Steelworkers of America, Applicant, v. Ebel Quarries Limited, Respondent

Certification — Practice and Procedure — Ballots of three segregated and not counted after employer claim that persons managerial — Eight of thirteen ballots counted in favour of union — Whether union may subsequently change position and agree some ballots segregated cost by managers

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and J. F. Kennedy.

DECISION OF THE BOARD; September 4, 1984

1. This is the continuation of an application for certification, in which the Board directed the taking of a representation vote. Three of the ballots cast were segregated by the Board on the basis of the employer’s position that each of those three individuals exercised managerial functions within the meaning of section 1(3)(b) of the Act. The non-segregated ballots have been counted, disclosing that eight ballots were cast in favour of the applicant and five against.

2. The applicant has now written to the Board conceding that one of the individuals whom it previously had disputed, and whose ballot had been segregated, Mr. Brad Dawson, in fact exercises managerial functions as alleged by the respondent employer. The employer

takes the position that all three of the individuals in dispute exercise the same duties and responsibilities, and further that the applicant ought not to be permitted to change its position once the result of the vote is known. On the latter point, the respondent relies upon the decision of the Board in *Greater Windsor Investments Limited*, [1976] OLRB Rep. Sept. 515.

3. The case cited by the respondent has to do with a party seeking to raise new issues pertaining to the bargaining unit after the membership position of an applicant trade union has been disclosed. There is nothing to prevent a party, where an issue has already been joined, from agreeing in whole or in part at any stage with the position being put forward by the party opposite. That is what has occurred in the present case. The applicant is at the same time entitled to maintain its position that the other two individuals in dispute fall short of the level of managerial responsibility, and that question will be determined on the evidence, including any evidence as to the overall structure of the respondent's organization.

4. As the applicant has indicated, its agreement with the respondent that Mr. Dawson is not properly included within the bargaining unit means that the applicant's right to certification can no longer be affected by the Board's determination of the status of the remaining two individuals in dispute. The Board accordingly certifies the applicant, pursuant to the provisions of section 6(2) of the *Labour Relations Act*, on an interim basis as bargaining agent for all employees of the respondent in the Township of Amabel, County of Bruce, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, and, for the time being, persons regularly employed for not more than 24 hours per week.

5. The parties had agreed between themselves that the issue with respect to the respondent's history of employing persons on a part-time basis would be deferred until the application reached this stage. The Board is not prepared to now deal with that issue in any but the normal way, and appoints an officer to inquire into and report to the Board on that matter as well as the duties and responsibilities of the two individuals remaining in dispute.

6. The issuance of a formal certificate must await a determination of the final description of the bargaining unit.

0842-84-R Ann Cooper, Jill Hulton, Judy Hanlon, Karen Schwarz, Applicants, v. **Kingston Township Professional Fire Fighters Association**, Respondent

Employee — Termination — Employees of Township of Kingston Fire Department applying for termination of bargaining rights — Whether covered by Act — Meaning of “full-time fire fighter” considered

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members I. M. Stamp and L. C. Collins.

APPEARANCES: *Ann Cooper and Jill Hulton for the applicants; J. Sack, Q.C., A. Baker, P. R. Burke, Ron Bowman and Claude Dupuis for the respondent.*

DECISION OF THE BOARD; September 17, 1984

1. This is an application for a declaration terminating the bargaining rights of the respondent pursuant to section 57(2)(a) of the *Labour Relations Act*. Section 57(2)(a) provides:

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

2. The respondent by its reply raised a jurisdictional challenge to the application, i.e., that the *Labour Relations Act* does not apply to the employees in the bargaining unit defined in the relevant collective agreement. On this basis the respondent seeks to have the application dismissed.

3. The collective agreement which is the foundation of this application is between the Corporation of the Township of Kingston (“Corporation”) and the Kingston Township Professional Fire Fighters Association Local 2852, International Association of Fire Fighters (“Association”). It was a first collective agreement between these parties. Its duration was between January 1, 1982 and December 31, 1983. The Association never received certification from this Board. This means that if the *Labour Relations Act* applies, any existing bargaining rights flow from and are determined by this collective agreement. The bargaining unit described in the collective agreement is:

all employees of the Township of Kingston Fire Department as defined in the collective agreement.

“Employee” is defined in the collective agreement to mean:

all personnel of the Fire Department under the jurisdiction of the Fire Chief, excluding the Chief, Deputy Chief and Volunteer Fire Fighters, pursuant to the Fire Department [sic] Act, R.S.O. 1980.

No list of “personnel” is set out. The balance of the definitions dealing with bargaining unit positions in the collective agreement which could encompass those who are under the jurisdiction of the Fire Chief pursuant to the *Fire Departments Act*, are:

“Fire Fighter” is defined in the collective agreement to mean:

all employees regularly employed in the Fire Department and assigned exclusively to fire protection and/or fire prevention duties.

“Fire Alarm Technician” is defined to mean:

all employees regularly employed in the Fire Department and assigned exclusively to communication’s operations and clerical duties of Kingston Township Fire Department.

“Communications Officer” is defined to mean:

all employees regularly employed in the Fire Department and assigned exclusively to supervision of operations, communications and fire alarm technician.

“Mechanic” is defined to mean:

a fire fighter holding a valid Ontario mechanic’s license and performing the function of mechanic with the Kingston Township Fire Department.

4. The Township of Kingston Fire Department is made up of 1 fire fighter who is a mechanic; 1 fire prevention officer (fire fighter); 4 fire alarm technicians (also known as dispatchers); 1 communications officer (also known as supervisor of the fire alarm technicians) in addition to the Fire Chief, a Department Fire Chief and a number of volunteer fire fighters. All, except the volunteer fire fighters and one fire alarm technician, are employed on a full-time salaried basis. The part-time fire alarm technician is not excluded by definition of the bargaining unit nor by definition of the position of “fire alarm technician” set out above. Article 15.03 of the collective agreement provides for money payment to part-time fire alarm technicians in lieu of various benefits and overtime provisions enjoyed by full-time employees. We therefore conclude that the part-time fire alarm technician is included in the bargaining unit of the collective agreement.

5. The *Labour Relations Act*, R.S.O. 1980, c. 228, section 2, states that it does not apply:

(e) to a full-time fire fighter within the meaning of the *Fire Departments Act*;

The *Fire Departments Act*, R.S.O. 1980, c. 164, section 1(d), defines a “full-time fire fighter” to mean:

a person regularly employed in the Fire Department on a full-time salaried basis and assigned exclusively to fire protection or fire prevention duties, and includes officers and technicians.

Fire Protection or Prevention duties are left undefined as are the terms “officer” and “technician”. Section 5 of the *Fire Departments Act* gives the full-time fire fighters the opportunity to bargain with the council of the municipality regarding remuneration, pensions or working conditions in the following fashion:

5.-(1) When requested in writing by a majority of the *full-time fire fighters*, the council of the municipality shall within sixty days after receipt of the request bargain in good faith with a bargaining committee of the *full-time fire fighters*, and shall make every reasonable effort to come to an agreement, for the purpose of defining, determining and providing for remuneration, pensions or working conditions of the *full-time fire fighters* other than the chief and the deputy chief of the fire department.

• • •

(3) Where not less than 50 per cent of the *full-time fire fighters* belong to a trade union, any request under subsection (1) shall be made by the union.

• • •

6.-(1) Where, after bargaining under section 5, the council of the municipality or the bargaining committee is satisfied that an agreement cannot be reached, it may by notice in writing to the bargaining committee or the council, as the case may be, require all matters in dispute to be referred to a board of arbitration of three members, in which case the council and the bargaining committee shall each appoint a member and the third member, who shall be the chairman, shall be appointed by the two members so appointed.

• • •

7.-(1) Every agreement under section 5 and every decision or award under section 6 shall be in writing and is binding upon the municipality and the *full-time fire fighters*.

(emphasis added)

6. All the applicants are fire alarm technicians (3 full-time and 1 part-time). They submit that they do not fall within the statutory definition of “full-time fire fighter” because they are not “exclusively assigned to fire protection or prevention duties”. In addition to their fire alarm room responsibilities, they do a range of “clerical duties” for the fire department such as writing all correspondence, doing the payroll for volunteer fire fighter, bookkeeping, secretarial and reception duties. They submit that no alarm room technician has ever been qualified to perform fire fighting duties *per se* prior to or after taking the alarm room technician job.

7. The respondent claims that the applicants are encompassed with the definition of “full-time fire fighter” in the *Fire Departments Act* because all of their duties are integral to and necessary for fire protection services of the department. The respondent also points out that the definition of “full-time fire fighter” itself, which explicitly includes “technicians”,

indicates a legislative intent to include those who do not have exclusive involvement in fire-fighting duties. Alternatively, the respondent states that the Board should not permit the application even if it can find that the applicants are not full-time fire fighters within the definition of the *Fire Departments Act* because the dispatchers or alarm room technicians are more appropriately included within the fire fighters unit. The respondent relies on the Board's decision in *The Corporation of the Town of Oakville*, [1970] OLRB Rep. Oct. 754 as authority for the proposition that this Board has found employees like the applicants to be "full-time fire fighters" and excluded from the *Labour Relations Act* by section 2(e). This Board also concluded in the same decision that even if they are not so excluded they ought not to be included in a unit different from the fire fighters because of the different economic sanctions available between the *Labour Relations Act* (strike/lockout) and *Fire Departments Act* (compulsory arbitration). The respondent also relied on an arbitration rights decision of Richard R. Walter, Q.C. between the *Chatham Fire Fighters Association, Local 486, International Association of Fire Fighters and the Corporation of the City of Chatham*, unreported, dated August 12, 1980, wherein the arbitrator found that the position of control room operator/dispatcher for the operation of the alarm room of the Chatham Fire Department is one covered by the collective agreement between the City and the Association. In the course of arriving at this conclusion the arbitrator considered the definition of "full-time fire fighter" in the *Fire Departments Act* and determined that those in the position of operator/dispatcher in the Chatham Fire Department were included. This finding was consonant with and relied upon another arbitration (rights) decision, i.e., *Re Borough of Scarborough and Scarborough Professional Fire Fighters Association, Local 626, I.A.F.F.* (1977) 15 L.A.C. (2d) 71 (Burkett). Also cited was the decision of Paul C. Birnie in *Nepean Professional Fire Fighters Association Local 1487 and the Corporation of the City of Nepean*, unreported, February 11, 1980.

8. We have considered the submissions of the parties and have come to the conclusion that three of the applicants are full-time fire fighters within the meaning of section 1(d) of the *Fire Departments Act*. Fire protection or fire prevention duties include more than fire-fighting duties. This is made clear by the *Fire Departments Act* itself. In section 2 of the Act the hours of work for full-time fire fighters are set out according to whether the full-time fire fighters are "assigned to fire-fighting duties" or "assigned to other than fire-fighting duties". Therefore it is apparent that a person does not cease to be a full-time fire fighter if assigned to duties other than fire-fighting. Having regard to the duties described by the applicants we find that all of these duties are performed for the Fire Department and that most are integral to its operation. The alarm room dispatching functions fall squarely within the area of fire-protection duties. This has been affirmed not only in the *Town of Oakville* decision of this Board but in the *Chatham* decision, *supra*, (which, although not binding on us, provides helpful guidance). In the *Town of Oakville* case the Board found that alarm room operators who spent 99% of their time dispatching fire units on receipt of an alarm and 1% of their time typing correspondence for the Fire Chief and the Fire Department personnel were assigned *exclusively* to fire protection or fire prevention duties and, therefore, were full-time fire-fighters excluded from the *Labour Relations Act* by section 2(e). In our view the fact that the applicants may perform a greater amount of clerical functions necessary to the operation of the fire department does not take them out of the definition of full-time fire-fighters. We are persuaded that the alarm room functions in combination with their other duties are duties integral to fire protection for the Township of Kingston whose actual fire-fighting is done in large part by a volunteer force. We interpret the definition of fire-fighter in section 1(d) of the *Fire Departments Act* to be designed to include all functions necessary and integral to the Fire Department so long as they are exclusively performed on a full-time basis. The definition itself states that it includes "technicians" — we agree with the respondent that this displays a legislative intent to encom-

pass more than those engaged in fire-fighting duties. The applicants are undoubtedly technicians because they are described in the collective agreement as "alarm room technicians" and therefore were regarded by the parties thereto as "technicians". While this designation does not dictate our conclusion, it does confirm our assessment that 3 of the 4 applicants fall within the definition of "full-time fire fighters" in section 1(d) of the *Fire Departments Act*.

9. Insofar as the applicant employed on a part-time basis is concerned, we consider that this individual alone could apply for the termination of the bargaining rights with respect to herself because she is not excluded by section 2(e) of the *Labour Relations Act*. While it is clear that an application for certification could not have been brought by a trade union to obtain representation rights for her alone, because section 6(1) requires that in every case an appropriate bargaining unit must have more than one employee, it is nevertheless possible for the Board to receive and process a termination application by the only employee in a bargaining unit (see, *A. R. Milne Electric Ltd.*, [1982] OLRB Rep. June 911). The respondent argues that this ought not to be permitted because in the *Town of Oakville*, as an alternative to its major conclusion that alarm room operators were excluded from the *Labour Relations Act* by reason of being full-time fire-fighters, the Board found that it would be inappropriate to include such operators in a unit with other non-full-time fire fighters. We do not think this reasoning is applicable to this termination application because the *Township of Oakville* case was considering an application for certification and section 6(1) requires the Board to consider the appropriateness of the unit applied for. No similar requirement is set out in connection with termination applications and the Board does not normally consider whether the unit forming the basis of the termination application is appropriate. We therefore will allow the application to proceed insofar as the part-time fire fighter is concerned.

1154-83-M Ottawa General Hospital, Applicant, v. Ontario Nurses' Association, Respondent

Employee — Employee Reference — Whether nurse clinicians excluded as management — Board reviewing cases dealing with registered nurses not primarily engaged in hands on nursing care — Concluding that persons employees

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF R. O. MACDOWELL, ACTING ALTERNATE CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; September 13, 1984

1. This is an application under section 106(2) of the *Labour Relations Act*. The parties seek the opinion of the Board on whether the individuals occupying the position of “nurse clinician” exercise “managerial functions” within the meaning of section 1(3)(b) of the Act. If, in the Board’s opinion, they do exercise “managerial functions”, then they are not “employees” covered by the Act. They would not be entitled to engage in collective bargaining, they cannot be members of the Association’s established bargaining unit, and they cannot be covered by the applicable collective agreement.

2. The applicant employer takes the position that the nurse clinicians have been a functioning part of the “management team” since the creation of that position in mid-1980. The employer asserts that it has a “decentralized” form of management organization of which the nurse clinicians are an integral part. The employer argues that they therefore must be excluded from collective bargaining under the *Labour Relations Act*. The respondent Association (“ONA”) acknowledges the important professional functions performed by the nurse clinicians, but asserts that they do not play a “management role” within the meaning of section 1(3)(b). They have little or no independent authority and even those duties of an arguably managerial character are circumscribed by the requirement of general discussion and approval by others.

3. We might note that this case arises, in part, because of the award of an arbitration board chaired by Martin Teplitsky, Q.C. The arbitration board had to determine whether the nurse clinicians were excluded from the collective agreement between ONA and the employer, which, in turn required a consideration of the “recognition” clause in the parties’ collective agreement. The board of arbitration found that the nurse clinicians were neither “charge nurses” nor persons *above* that rank, and thus they were part of the bargaining unit covered by the collective agreement. The employer’s position in this case is that the nurse clinicians are not “employees” within the meaning of the Act, so that they cannot be covered by the agreement in any event. Needless to say, whether that position can be sustained or not depends upon what the nurse clinicians actually do, and the interpretation of section 1(3)(b) of the *Labour Relations Act*.

4. In accordance with the Board’s usual practice in these matters, it appointed a Board officer to inquire into and report on, the duties and responsibilities of the disputed individuals. The evidence was transcribed in the officer’s report, which, like the Board decision itself, notes certain agreements upon which the parties were prepared to proceed. Those agreements need not be repeated here. It suffices to say that following the release of the officer’s report both

parties were extended the opportunity to make representations as to the conclusion which Board should reach in light of the evidence, and both parties took that opportunity. Our opinion, therefore, is based on the evidence contained in the report and the written representations received from the parties.

5. In view of the circumstances of this case, and the submissions of the parties, it may be useful to refer to the jurisprudential background against which this decision is made. Although each case turns on its own facts, this is but the latest in a long series of cases where the Board has had to consider the status of registered nurses who were not primarily engaged in “hands on” nursing care, but rather were performing a variety of teaching, co-ordinating, administrative and professional functions. See *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154; *Ajax and Pickering Hospital*, [1970] OLRB Rep. Feb. 1283; *Essex Health Association*, [1970] OLRB Rep. Nov. 824; and *Toronto East General Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671. It may be useful therefore, to review the background of section 1(3)(b) of the Act, and the way in which the Board has approached its application in the health care field. As will be seen, in a professional milieu, it is often difficult to identify and distinguish undisputably “managerial functions” as that term is used in common parlance, or in a typical office or industrial setting. The nursing professionals in a modern hospital must necessarily *share* the responsibility for the quality of patient care, engage in collegial modes of decision making, defer to those members of the health care team with specialized training or experience, and faithfully report conditions potentially prejudicial to the patients’ welfare — even if that implies some criticism of other members of the team. In this professional context, the “workers versus bosses” model — with its emphasis on conflicting interests — may underestimate the shared professional goals and responsibilities of the individuals concerned. Indeed, in the case of registered nurses, those duties may exist quite apart from the usual structures and lines of authority evident in the typical employer-employee relationship, because the nurses’ conduct, judgments, and performance may be scrutinized by the College of Nurses pursuant to the *Health Disciplines Act*. Censure by that body can lead not just to loss of a job, but also the forfeiture of a career requiring years of training. It is hardly surprising therefore that, as a result of extensive professional training and external constraints, there is little need for the forthright front-line manager frequently found in the industrial setting. That is why it is sometimes difficult to distinguish those employees (in a common law sense) who should not be treated as employees for collective bargaining purposes. That is what section 1(3)(b) is really about.

6. Section 1(3)(b) of the Act currently reads as follows (emphasis added):

1(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

7. Section 1(3)(b) has been in the statute in its present form since 1957, when, following the decisions of the Supreme Court in *Re O.L.R.B.*, *Bradley et al* and *Canadian General Electric Co Ltd*. [1957] O.R. 316 (C.A.) rev’g [1956] O.R. 437 (O.H.C.), the Legislature amended the section to clarify the Board’s jurisdiction and authority. The “old” wording read:

- (3) For the purposes of this Act, no person shall be deemed to be an employee, . . .
- (b) who is a manager or superintendent or who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

This change in statutory language did not change the basic problem to which section 1(3)(b) is addressed, although in the decades following the amendment the Board has had to apply section 1(3)(b) in employment settings markedly different from those prevalent and typical in the 1950's. (For an interesting commentary on the extension of collective bargaining to white-collar salaried professionals — a trend characteristic of the 1960's and 1970's, see: G. W. Adams, "Collective Bargaining by salaried Professionals" (1977) *Industrial Relations*, Volume 32, No. 2 at pp. 184-199).

8. The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g, individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

Similar general observations were also made by this Board in *Toronto East General Orthopaedic Hospital, supra*, where the Board was also considering the status of health care professionals and had this to say:

The section 1(3)(b) exclusions represent a legislative recognition that viable collective bargaining requires that employers be able to effectively participate in that adversary process known generally as labour relations. It was felt that effective participation in the labour relations process — a process that centers on collective bargaining — requires some assurance of security in the ranks of management. Moreover, the inclusion of independent decision-makers, particularly decision-makers in the realm of labour relations, in the bargaining unit might compromise the judgment of such individuals. But the section has not been an easy provision to apply. Because of the complexities of the work environment and the need to balance the rights of employees to join and fully participate in a trade union against the employer's interest in maintaining its labour relations, the Board has had to make very difficult judgments in drawing the line that demarcates management from the bargaining unit; (See generally *The Corporation of the District of Burnaby and CUPE, Local 23* [1974], Can. LRBR 1 (B.C.); Reed, *White-Collar Bargaining Units under the Ontario Labour Relations Act* (1969) p. 27. For the United States approach to these exclusions see Note, *Labour Law — The National Labour Relations Board redefines and Restricts the Scope of Managerial Employee Classification* (1973) 26 and. L. Rev. 850). But because *The Labour Relations Act* must be interpreted as an Act in the public interest, it is incumbent on persons who seek to exclude employees from the scheme of the Act to prove that such persons exercise managerial functions. (See *Bakery & Confectionery Workers I.U.A. v. Salmi* 56 D.L.R. (2d) 193).

9. These concerns underlie and help to explain the Board's decisions under section 1(3)(b); however, the *Labour Relations Act* itself does not contain a definition of the term "managerial functions", nor are there any specified criteria to guide the Board in forming its

opinion. The task of developing such criteria has fallen to the Board, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so-called “first line” managerial employees, an important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer’s business. It is evident that persons making significant executive or business decisions should be considered a part of the “management team” even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

10. As we have already noted, a perusal of the Board’s jurisprudence in the health care sector, and elsewhere, reveals the special significance accorded to the authority to make decisions which impact significantly and adversely on an employee’s wages, benefits or job security. It is that kind of decision-making which the Board has always regarded as the exercise of a “managerial function” which justifies an exclusion from collective bargaining on the “conflict of interest” rationale set out above. Indeed, in Ontario, the Board has extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker, to those who make what the Board has called “effective recommendations” which materially affect the conditions of employment of those supervised. [See: *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. April 261, and *Inglis Ltd.* [1976] OLRB Rep. June 270; and for a contrary view of the effect of similar provisions in the *Canada Labour Code*, see: *British Columbia Telephone* 76 CLLC ¶16,015 at page 467 where the Canada Labour Relations Board expressed concern about the apparent “instant multiplication of managers” excluded from the Code, when the decision maker decides to base his decision upon the “input” of a number of informed subordinates, acting in committee or independently consulted.] In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or “input” is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising “managerial functions”. Modern business organizations — especially those employing professionals, — encourage the free flow of information and ideas from subordinates to superiors. Consultation and involvement in the decision-making process, improve communication in both directions, clarify the employer’s problems and objectives, improve employee morale, and make optimum use of employee ingenuity or expertise. “Participatory management styles” have become a prevalent technique in large organizations for reducing employee alienation and increasing commitment to the goals of the employer. In small organizations, consultation is inevitable because of the small number of individuals who must work together effectively if the goals of the organization are to be realized. One should not conclude however, that the existence of consultation, or an apparent “democratization” of decision-making, means that real managerial authority has percolated downwards. “Managerial” authority in the sense intended by the statute (i.e. authority of such character that it excludes the individual(s) from the terms of the Act) cannot be substantially diluted, diffused, dispersed, distributed or decentralized throughout an organization, without raising a question about whether these various participants in “collective” decision-making must necessarily all be excluded from the scope of the Act. An employer is entitled to structure his organization as he sees fit, but there

is a limit on the extent to which he can unilaterally multiply the number of excluded persons by purportedly creating additional "foremen", or by installing a process of management by committee. On the other hand, there will obviously be situations where individuals make serious recommendations which regularly and significantly impact upon the employment situation or security of fellow employees. If these recommendations, on the evidence, are routinely acted upon to the detriment of those employees, then it can be said that the person making the recommendation is, if not the actual decision-maker, then one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic destiny of his co-workers. Such influence carries with it the potential for conflict to which section 1(3)(b) is directed. It remains a question of evidence whether an individual's own authority extends this far.

11. Unfortunately, as the Board noted in *Toronto East General Orthopaedic Hospital*, the line between "employees" and "management" for labour relations purposes is frequently very difficult to draw. In each case, the Board attempts to ascertain the degree of effective control which the alleged "manager" has over his "subordinates'" employment relationship — bearing in mind the employees' right to collective bargaining, and the potential for the kind of conflict which section 1(3)(b) was designed to avoid. But there is no litmus test which is universally applicable and dictates the result in every situation. In assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and the individual employer's organizational scheme. Moreover, organizations, collective bargaining structures and the Board's own jurisprudence are all in a process of evolution. In *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154 the Board put it this way:

In earlier days when this Board was formulating criteria for determining managerial functions it was confronted in the majority of cases with industrial situations. Labour Relations has now evolved to the point where we are presently being confronted with increasing applications for white collar bargaining units, particularly in municipalities and other government bodies and also at Universities.

The organization of industry in many instances has evolved to the point where it differs from the period when the Board was first formulating its views about managerial functions. Some account must be taken of the changing situation. Further, while many white collar bargaining units are similar to bargaining units in the industrial sector, there are many instances where the industrial model, which we have developed at this Board, is not applicable to the white collar model. It is therefore necessary that our decisions with respect to bargaining units and managerial personnel reflect the new and evolving situations rather than reflect an oversimplified application of the former industrial criteria to the white collar area.

That approach is not unusual, and we have recognized that certain industries and certain areas require separate treatment. For example, in the construction industry and in the printing trades, working foremen are generally included in the bargaining unit to reflect the peculiarities of those industries, whereas in the industrial situation foremen are generally excluded from the bargaining unit; see e.g. *Federal Packaging and Partition Company Limited* [1971] OLRB Rep. July 448 at p. 450.

We have long recognized that in the early stages of industrial organization the foreman was a key person in the management hierarchy. Persons looking for a job came to the foreman, who had the right to hire, to fire, to grant raises and to assign work. The foreman was effectively “the king of the shop” insofar as the employees were concerned. He had a great deal of discretion and he was able to make decisions which greatly affected the welfare of the employees. Moreover, he exercised considerable control over their day to day work life. The evolving position of the foreman in industry is more fully described in the *Spruce Falls Power and Paper Co. Limited* case 47 CLLC ¶ 16,489, and it is not necessary for us to describe that situation any further.

However, a very important and significant factor in arriving at decisions about whether foremen were managerial was the conflict of interest theory which recognised that foremen owed a duty to management to control and discipline employees, and if the foreman was placed in the bargaining unit so as to become a union member, it would seriously impair his management function. As such, the duty to be owed to management would be incompatible with the trade union interests that he held in common with his fellow employees; cf. *Ferranti-Packard Electric Limited* [1968] OLRB Rep. Sept. 572.

The evolution of industrial organization and the advent of collective bargaining altered the position of the foreman in many situations. He is no longer the “king of the shop”; hiring and firing are done by the personnel department; the work may be controlled by the terms of a collective agreement or where there is no collective agreement the work may be controlled in a similar fashion. The result of the many changes in the hierarchical structure has diminished the foremen’s responsibility to the point where he may be left with the vestiges of power that he once exercised and where he previously stood visibly with management he now stands on the periphery between being a member of management and being an employee. In a limited fashion he may still continue to exercise managerial functions and it is the usual rule of thumb in describing bargaining units to place a foreman in the management hierarchy.

Determination in the white collar area have also become more difficult. We have indicated we must be cautious in using the industrial model to make assessments about non-industrial or white collar situations. However, we now have greater experience with the white collar section and we are able to draw on our specific experience in that area. In the non-industrial area we are now finding that the decision-making process and control of employees vary considerably. Like the industrial situation, personnel policies are usually developed by a personnel department, but the elements of management are usually dispersed throughout the organization. Real control and managerial functions are easily ascertained at the top of the management pyramid, but at the lower levels managerial functions are filtered through the organization in such a way that they are not easily ascertainable. Many non-industrial situations have developed a collegial decision-making process which reflect that type of organization. For example, technicians or draftsmen may work with an engineer in a white collar situation in such a manner

that they participate in the decision-making process. Again, the nature of their work is such that they move from project to project so that it is difficult to ascertain who controls the employees; see e.g. *The Hydro-Electric Power Commission of Ontario* [1969] OLRB Rep. Aug. 669.

Indeed, in *Toronto East General Orthopaedic Hospital*, *supra*, the Board emphasized both the difficulty in making managerial status determinations, and the need to reconsider and develop its approaches in light of the changing industrial relations environment:

Drawing the line is a particular problem where individuals are assigned more than one function, to varying degrees, or where actual decision-makers rely very very heavily on the opinion of experienced and highly trained personnel. *The Board then has to be very cautious in balancing the aforementioned interests of employers against those of employees. Otherwise fragments of an enterprise's managerial function could be distributed over a great number of individuals within the enterprise or decision-makers might rely on information pooled from a great swath of lower line personnel, thereby denying legislative coverage to a large sector of the work force.* Hence the Board has ruled that a person must be "primarily engaged in supervision and direction or other employees . . . [with] . . . effective control over their employment relation-ship", [sic] (see *Falconbridge Nickel Mines Ltd.* [1966], OLRB Rep. Sept. 379. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety: (*Falconbridge Nickel Mines Ltd.*, [1966] OLRB M.R. 379). Moreover, titles alone are not of much assistance in determining what a person's functions really are; (see *United Steelworkers, Local 2890 v. R. McDougall Co. Ltd.* [1943] OWN 743). Similarly, the Board has ruled that unless a person has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining; (*Falconbridge Nickel Mines Ltd.*, *supra*) and an incidental or isolated involvement in some aspects of labour relations is not sufficient to exclude a person from collective bargaining; (*Falconbridge Nickel Mines Ltd.*, *supra*). With regard to management's reliance on the advice of employees who possess highly technical skills and knowledge, the Board has said the following: (*CUPE, Local 1000 and The Hydro-Electric Power Commission of Ontario* [1969] OLRB Rep. Aug. 669.

In addition, the fact that managerial persons rely on the expertise of senior employees or employees who possess highly technical knowledge and skills, and act upon the advice of such persons, does not change the nature of the functions exercised by the employees. The fact that an expert employee may recommend a course of action which a member of management may decide to follow does not of itself make the employee's recommendation a managerial function. Although a recommendation may be the basis of the decision taken, however, it is the *decision* to implement that recommendation which can correctly be described as the managerial function.

But because of the dynamic contexts in which the Canadian labour relations system resides, (see John T. Dunlop, *Industrial Relations Systems* (1958) p. 7) the Board must constantly reappraise its standards and definitions as a result of its unique role in provincial labour policy formulation; (see Note, *Labour Law — The National Labour Relations Board Redefines and Restricts the Scope of Managerial Employee Classification*, *supra*, p. 862). For example, accelerated corporate growth and a rapid advance in technology have given rise to a greater concentration of economic power on the side of management and a concomitant bureaucratization of jobs that involve less supervisory duties, public contact and upward mobility. Nowhere do we see this trend more prevalent than in white collar sector of the Canadian labour market; (See generally, S. Goldenberg, *Professional Workers and Collective Bargaining*, Task Force on Labour Relations (1968); F. Bairstow, *White Collar Workers and Collective Bargaining*, Task Force on Labour Relations (1968) J. Crispo, *Collective Bargaining and the Professional Employee* (1966); *The Current Industrial Relations Scene in Canada*, Industrial Relations Centre, Queen's University (1974) p. S-MP-9); and many legislatures in jurisdictions where labour boards may have failed to be sufficiently appreciative of such contextual changes have now specifically provided for the extension of collective bargaining to these people; (see *Canada Labour Code*, R.S.C. 1970, c. L-1, s. 125(4), s. 107; *Labour Code of British Columbia*, S.B.C. 1973, c. 122, s. 1, s. 47; *Manitoba Labour Relations Act*, C.C.S.M., c. L-10, enacted by S.M. 1972, c. 75, s. 1(k)(i), s. 2(2). The Ontario Board must be very conscious of the rapid growth in white collar employment and consider implications it has to their decision-making function.

(emphasis added)

12. In recent years, as collective bargaining has extended to technical and professional employees (engineers, for example, were specifically included in the Act only in 1971), the Board has had to deal with increasingly complex job hierarchies and reporting structures. In a professional context, the members of the bargaining unit may well be highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment, requiring little external direction in the performance of their regular duties and ultimately responsible to external regulatory *authorities, entirely independent of their employer*. As we have already mentioned, such direction as is necessary will often be generated internally through group discussion, evaluation by peers, or "collegial" modes of decision-making; and one should not expect the managerial structure appropriate for professionals to be the same as that for manual workers. The technical or professional employee will have a special relationship with management, with fellow professionals, and with the less skilled employees at lower levels on the job hierarchy.

13. Persons who exercise skills, or perform functions which reflect their own specialized training or responsibilities, will necessarily have a specialized role to play in respect of those with lesser or different training and experience. Frequently, it is only the most experienced, highly trained, or specialized employees who will fully understand the technical requirements of a particular job, and whether it is being done in the safest and most efficient manner. It is part of their job to ensure that appropriate techniques are being applied, and that the work is being done properly. Their expertise and technical judgment are an integral part of the group

effort. In such circumstances, it is inevitable that they will have a special place on the “team” and will have a role to play in co-ordinating and directing the work of other employees — but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower level of skill, education and training or sometimes perform an assigned role as teacher and trainer — a role which inevitably involves some degree of evaluation — rendering a kind of “report card”. In a blue collar context “master craftsmen” typically perform such functions in respect of “journeymen”, “apprentices” and assorted “helpers”. In a university setting, appraisal by professional peers is institutionalized, and it is not at all unusual for “tenure committees” composed of professors and associate professors to determine whether an assistant professor will move to the ranks of those whose job security and income status are much more secure. But this does not mean that these individuals are precluded from engaging in collective bargaining or, for that purpose, should not be treated as “employees” of the university. This is not to deny that professional or technical employees may also exercise “managerial functions” within the meaning of section 1(3)(b). It is simply that there must be a careful appraisal of the context, and the focus should be upon those powers exercised by the disputed individual which have a significant, direct, and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the “collective bargaining” conflict to which section 1(3)(b) is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its “opinion” in particular cases.

14. Of course, these themes are not new to the health care industry. Nurses were one of the first professional groups to organize and engage extensively in collective bargaining; and it is not surprising therefore, that many of these issues were first canvassed in cases involving nurses or other health care professionals. Often the person in question was a “head nurse”, “charge nurse” or other person “in charge” of a hospital ward, and responsible for supervising the activities of the various R.N.’s, R.N.A.’s, health care aides, orderlies, kitchen staff, and so on, who made up the “health care team”. These “head nurse” cases usually arose in a hospital setting and the significant feature of these cases is the extent to which the Board focused on the special role of professional employees, and declined to equate supervisory or co-ordinating duties inherent in that role, with managerial functions. Thus, in *Essex Health Association*, *supra*, the Board wrote:

Professional or semi-professional employees such as head nurses and nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons’ professional or technical skills. While nurses may give certain directions to others, e.g. orderlies, in the exercise of their professional skills, these directions are not dissimilar to the directions given by a journeyman to an apprentice in other crafts. Again, the reporting functions exercised by head nurses in this case may

be likened to the reports one may expect from a journeyman concerning the progress of the apprentice. *The head nurses report but they do not initiate independent action with respect to the employment status of others who must follow the assignments given by the head nurse.* It is also interesting to note that the assistant head nurses, whom the parties have agreed are included in the bargaining unit, perform substantially the same functions as the head nurse on the shifts not worked by the head nurse.

(emphasis added)

Registered nurses necessarily perform duties requiring specialized knowledge, skill and judgment, in assessing health needs, and in the planning, implementing, and evaluation of nursing care — evaluation which can extend to both the suitability of the prescribed medical regimen and the adequacy of the “delivery system” established to meet the patient’s needs. In this context, professional assessments and decisions may be taken, or professional opinions acted upon, quite apart from any “managerial” authority of the kind with which section 1(3)(b) is concerned.

15. The notion that effective health care requires a “team approach” has not been absent from the Board’s jurisprudence. On the contrary, the fact that health care could best be provided by a “team” and that the members of that team would have their own specialized professional functions typically co-ordinated by a “team leader”, was expressly recognized in *Toronto East General Orthopaedic Hospital*, *supra*

But this is not to say that every employee goes his or her own way without regard to the necessary co-ordination needed within large institutions such as hospitals. Each employee’s activities, while quite independently administered to the patient, must be co-ordinated throughout the hospital with the related activities of others. For instance, nurses must have regard to the duties of other nurses, to the duties of other nursing assistants, to the duties of ward aides and they must have regard to the directions of doctors caring for the various patients. Hence there is a tremendous need to co-ordinate the professional and technical activities of nurses and to this end elaborate policy formulations are communicated to them, and a specialized group of *co-ordinators* has been created. This group of co-ordinators includes supervisors, head nurses, assistant head nurses, charge nurses and graduate nurses on occasion. Whether any in this group of co-ordinators exercises managerial functions, as well as performing a co-ordinating function, is a question that must be decided on a case by case basis, and any inquiry must consider whether the inclusion of such people would have a serious effect on the labour relations of the particular institution before the Board. This Board is dealing with assistant head nurses employed by Toronto East General and Orthopaedic Hospital Inc. But it must be emphasized that mere co-ordination is an insufficient function to activate the exclusionary wording of s. 1(3)(b); (see *The Faculty Association of Vancouver City College (Langara)* and *Vancouver City College*, May 22, 1974, B.C. Labour Relations Board where Division Chairmen were included in the bargaining unit).

In *Peterborough Civic Hospital*, *supra*, these co-ordinating, monitoring and reporting functions

were performed by the head nurses “in charge” of a ward, and were described by the Board this way:

Head nurses stand at the very boundary between the employee group and management. The head nurse in this particular case is indicative of the role usually played by head nurses. Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example, a head nurse is still involved in patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. Neither of these roles is a management function, but is merely the function of the training and experience of head nurses. In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is carried out in correspondence with a predetermined policy and the head nurse is merely implementing policies decided at a higher level. This implementation should not be confused with the decision-making or control function that goes hand in hand with management.

Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to “keep its ear to the ground” and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have that type of responsibility that one envisions as being managerial. She is not akin to the early foreman that we have spoken about, nor does she have duties that are incompatible with placing her in the bargaining unit. There is no conflict between the duty that she owes to management and her being a member of the bargaining unit. Again in this case, as in the *Ajax and Pickering General Hospital case, supra*, her very limited role indicates that she is not a member of management. For example, if an employee wants time off in excess of one hour the head nurse must consult her supervisor. Surely, if she were management she would have a greater hand in awarding time off. The type of limited responsibility permeates other areas as well and in our view her lack of responsibility indicates that she is not part of the management team.

(See also: *Westmount Hospital*, [1976] OLRB Rep. Feb. 24; and *St. Peters Hospital*, [1975] OLRB Rep. March 247.) In the instant case, the parties have clearly excluded “charge nurses” from the bargaining unit, and the issue is whether another employee group which does not exercise the range of charge nurse functions and are not “above the rank of charge nurse” in an organizational sense should also be excluded.

16. All of these cases involved individuals who, in varying degrees were performing supervisory, co-ordinating, admonitory or “quality control” functions which historically or in other contexts might have been associated with managerial status. Such functions included: co-ordinating the work of others, ensuring that the work was done properly in a technical sense, checking and correcting it where necessary, reporting or making note of errors or deviations from the prescribed medical regimen, scheduling, arranging for a “fill in” if a member of the team is absent, allowing an orderly or aide to go home a few hours early, giving an opinion on the proficiency, work habits, competence or compatibility of new or lesser skilled employees when asked to do so by a member of management, delegating or rearranging work assignments, calling in plumbers or maintenance persons to handle mechanical break-downs on “off-shifts”, attempting to ensure compliance with the institutional “rules” laid down by management and admonishing or reporting an employee who did not comply, consulting with management on the running of the enterprise, and, even, on occasion, requiring an employee unfit to work to go home for the balance of the shift then reporting the incident to the director of nursing for disposition. Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, co-ordinating, training, testing, reporting, consulting and *minor* admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be “managerial functions”. They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b). And in a professional context where “reporting” is part of an individual’s professional responsibilities and the ultimate decisions are made by someone else (usually an “administrator” who may or may not be a professional himself) or by a group of individuals, then the “effective recommendation test” referred to above must be carefully applied. (For specific comment on employee evaluations and the need for clear evidence of their impact see: *Toronto East General Orthopaedic Hospital, supra*, at ¶16; *Ajax and Pickering Hospital, supra* at ¶17; *Mascassa Lodge, supra*, at ¶20; *St. Peters Hospital, supra*, at ¶7-8; *Regional Municipality of Halton, supra*, at ¶10; and *Sudbury and District Health Unit*, Board File No. 2055-79-M decision released March 11, 1981, unreported, at paragraph 13.)

17. With this background then, we turn to the evidence in the instant case, which included testimony from Roberta Coutts, the Director of Nursing, Margaret Arnott, a nurse clinician, and Monica Leslie a “team leader”. We will not repeat, as reasons for our opinion, the text of their testimony as transcribed and reproduced in the Officer’s report. Having set out our approach, at length, we will only briefly sketch in an overview of the evidence.

18. The collective agreement excludes charge nurses, administrative assistants and co-ordinators from the bargaining unit. The position of nurse clinician was ranked by the hospital on an organizational basis at the level of charge nurse — expecting that by so doing the seven nurse clinicians would automatically be excluded from the bargaining unit. A typical day shift would include 15 R.N.’s, 4 R.N.A.’s and 2 orderlies working with a charge nurse, nurse clinician and administrative assistant in each area. The employer’s position is that there are 4 “management team” members of roughly equal status who are accountable to and work in conjunction with a programme manager. While the employer characterizes this as a unique system of “decentralized management”, in many settings it would be considered “top heavy” — especially since the trained professionals are unlikely to require the degree of direct supervision and control of, say, a factory worker in an industrial plant.

19. The evidence indicates that the primary concern of the nurse clinician, and the majority of her time is spent on instruction and orientation, both on a group and “one to one” basis. This is essentially a training function — although for professionals, it obviously involves

continuing education and evaluation to maintain and up-grade their skills, as well as, for the nurse clinician, the ongoing assessment and initiation of new practices and procedures. This necessarily involves some supervision of those practising new procedures or the incidental assignment of work (e.g., to have a staff nurse give a short report on a new or unusual problem she is dealing with). None of these functions are “managerial” within the meaning of section 1(3)(b), and we repeat, they are the duties which take up the majority of the nurse clinician’s time. The employee evaluations are done in connection with this role and are not made independently except perhaps in the case of probationary employees — and even then the written report is submitted to the Human Resources department as one factor to be considered in the retention of an individual. Traditionally, the Board has not given much weight to assessments of probationary employees because it is not at all unusual for management to solicit a wide range of opinions from bargaining unit and non-bargaining unit employees concerning how a probationer is getting along, all of which are often weighed in the balance by someone other than the person expressing the view or making the assessments. Input at this stage is not particularly significant for collective bargaining purposes nor can one attach much significance to the fact that a variety of individuals may sit in and provide information and input at the point of hiring. One would expect the person responsible for orientation and training or familiar with the work to sit in on such meetings which, again, make collective decisions. Ms. Arnott had never sat alone on a selection committee for on-call (casual) employees, and she said, she had been part of the selection committee for regular full-time employees in only 40% of the cases. She further indicated that for regular full-time employees it is the relevant charge nurse or co-ordinator who does the performance evaluation. The nurse clinician’s role is primarily one of providing background written documentation, or she may sit in on the appraisal to explain the documentation she has already provided or address specific issues. It is not entirely clear how much actual impact such evaluations have as a practical matter, or who decides whether something tangible like a promotion, demotion or wage increase will or will not be granted based on such documentation, or what role, if any, the nurse clinician plays in such decision making.

20. The initiation of discipline is obviously an important managerial function even if the decision is ratified by a personnel manager or other higher level of authority. The discipline of fellow employees is an important manifestation of authority, not least because it can give rise to employee grievances under the collective agreement which may place the employer and the union in an overtly adversarial role. However, the role of the nurse clinician in the imposition of discipline is peripheral and not much different in character from that of other professional nurses who are expected to report incidents of error or misconduct which could directly or indirectly affect patient care. Medication errors or breaches of procedure are reported by all nurses, and it is interesting to note that Ms. Leslie testified that misconduct is to be reported to the charge nurse, not the nurse clinician. The documentation or follow up of a medication error, although it may be done by a nurse clinician is not considered disciplinary. The nurse clinician does not give verbal or written warnings when acting in that capacity. In the case of nurse “O.B.”, the actual incident at issue was brought to Ms. Arnott’s attention by a staff nurse and the team leader, (both in the unit), reporting in accordance with their professional responsibilities. The written warning issued to Ms. O.B. was not given by the nurse clinician. Employee grievances under the collective agreement are not presented to the nurse clinician but to the immediate supervisor — the charge nurse. The nurse clinician is not involved, except perhaps as a witness in an arbitration hearing in respect of what she has seen or done in the exercise of her professional responsibilities. That is no different — and clearly no more troubling in a collective bargaining sense — than the staff nurse and team leader who might be called upon to testify “against” nurse O.B. in respect of the errors they observed. Whether the nurse

clinician is exercising managerial functions when she is filling in for someone who has such authority is not really material. Ms. Leslie, a team leader has replaced the charge nurse a number of times in the last few months, and whatever her status for those limited periods of time, no one is suggesting she is no longer an “employee” within the meaning of the Act. The nurse clinician is in no different position.

21. Clearly, the hospital has, for administrative purposes, treated the nurse clinician as a part of “management”, and accordingly, they have some of the trappings of management. They receive the same benefits as other RN’s, are on salary, and work the same hours but do not receive overtime. They even attend some “management” meetings which other employees do not — although not meetings to deal with specific employee grievances, collective bargaining negotiations, and so on. However, when the evidence is considered in its totality, it is our opinion that the nurse clinicians do not exercise management functions within the meaning of section 1(3)(b) of the Act. Their principal role is not managerial in character, and any residual authority they exercise is so subordinate and attenuated as to be insignificant, for collective bargaining purposes, and in this professional context, from the activities and responsibilities of other members of the bargaining unit. In our opinion they are employees within the meaning of the Act.

DECISION OF BOARD MEMBER F. W. MURRAY;

1. I dissent.

2. I do agree that in a professional context it is often difficult to draw a line between managerial and non-managerial employees for collective bargaining purposes. While I also believe that it would be an abuse of section 1(3)(b) for the Board to permit an employee to declare employees to be managerial and excluded from collective bargaining by means of so distributing the managerial functions amongst an unreasonable number of employees, I do not believe that this has occurred in this case. I do believe that the Board in this case should find that the nurse clinicians have sufficient managerial authority so as to exclude them from the bargaining unit.

3. In so finding, I make quite a distinction between the responsibility for initiating an evaluation report which may affect another nurse’s continued employment as opposed to the act of being subpoenaed by a board of arbitration and giving testimony under oath which may be “against” another nurse.

4. In the difficult task of drawing the line between managerial and non-managerial employees, even in this “professional” context, one cannot ignore the natural “closing of ranks” that may well occur within a profession unless there is a clear distinction made between managerial and non-managerial employees, even setting aside the collective bargaining environment. It can therefore be very important that those required to report on the shortcomings of others be clearly identified as having managerial authority. Having regard to the fact that the Board has recognized that the structure of any managerial team is not carved in stone for all time but can change as the needs of the undertaking require, it would seem to me that the Board should not impose its concepts of how a complex operation such as this hospital should be staffed and supervised unless there is clear evidence of distribution of the management function to an unnecessary number, and in so doing the Board should be mindful of the continuous nature of the operation itself.

5. I would have found that the nurse clinicians are exercising a managerial function and should accordingly be excluded from the bargaining unit.

1045-83-R;0903-83-R;0904-83-R;0905-83-U Penmarkay Foods Limited, Applicant, v. Retail Wholesale & Department Store Union, Local 414, Respondent; Retail Wholesale & Department Store Union, Local 414, Applicant, v. Dominion Stores Limited, Willett Foods Limited, Penmarkay Foods Limited, Respondents; Retail Wholesale & Department Store Union, Local 414, Applicant, v. Dominion Stores Limited, Willett Foods Limited, Respondents

Related Employer — Sale of a Business — Dominion franchising unprofitable stores through corporate relative Willett Foods — Common control sufficient to make all three entities related employers — Parties agreeing sale occurred — Whether inappropriateness of Dominion's province-wide agreement to single store operation reason to terminate bargaining rights under section 63(5) — Related employer declaration issued in addition to funding of sale

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. A. Ronson and E. G. Theobald.

APPEARANCES: *Barry W. Earl, Q.C., and John Woon for Penmarkay Foods Limited; Ross Dunsmore and Michael Hines for Dominion Stores Limited and Willett Foods Limited; James Hayes, William Kaplan, Robert McKay and Bert Scott for Retail Wholesale & Department Store Union, Local 414.*

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN, AND BOARD MEMBER E. G. THEOBALD; September 24, 1984

1. This dispute arose out of the franchising of stores formerly operated by Dominion Stores Limited ("Dominion") as corporate stores. The franchisees, carrying on business under the name Mr. Grocer, have entered into a franchise arrangement with Willett Foods Limited ("Willett") which is a corporate relative of Dominion. When the stores were operated by Dominion, the work force fell under a master agreement between the employer and Local 414 of the Retail, Wholesale & Department Store Union (the "union"). The first franchisee to open a Mr. Grocer store was Penmarkay Foods Limited ("Penmarkay"). Conceding a business has been sold within the meaning of section 63 of the *Labour Relations Act*, Penmarkay has applied under section 63(5) for an order terminating the union's bargaining rights. This application followed an application by the union under section 63 relating to the store operated by Penmarkay. The union also seeks a ruling, under section 1(4), that Dominion, Willett and Penmarkay are one employer for the purposes of the Act. In addition, Local 414 has filed a complaint under section 89 alleging a violation of sections 50, 64, 66 and 67.

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2. The first Mr. Grocer store opened in the spring of 1983; but Dominion's interest in franchising can be traced back to the mid-seventies, according to Mr. Larry Gee, now vice-president of operations. Dominion was being badly hurt at that time by recurring price wars in the grocery industry. Unlike other grocery companies, Dominion was strictly a retail business with no processing or wholesaling arm. When consumer prices dropped during a price skirmish, competitors with diversified operations were able to maintain a stronger profit position than was Dominion. One of Dominion's first ventures into the wholesale market was the creation of Min-A-Mart Ltd. in 1975, as a wholly-owned subsidiary. This company has established forty-eight convenience stores; forty-one are presently franchised and the others are awaiting a willing franchisee.

3. Also in 1975, Dominion purchased a majority of the shares of a company now known as Willett Foods Limited which was then carrying on a wholesale business in the Maritimes. Willett was one of two Atlantic wholesalers acquired by Dominion in the mid-seventies — the other is Donovan's Wholesale Limited in Newfoundland. Between 1975 and 1980, Willett's annual sales increased almost ten-fold to thirty million dollars; Willett doubled the size of its plant in St. John's, purchased Dominion's plant in Halifax and expanded it, and acquired O'Brien's Produce in Halifax. Dominion acquired sole ownership of Willett in 1980 through a holding company, Quintana Inc., which is itself a wholly-owned subsidiary of Dominion. The expansion of Willett's wholesale business in the Maritimes continued after 1980 with the opening of a cash and carry operation in Halifax and Moncton and the acquisition of Mason's in Sydney and Judson Foods in Moncton. A tentative entry into franchising in the Maritimes was made by Willett in 1979 or 1980 when it opened a model store under the name Village Mart; this store was not a success and closed two years later.

4. Willett first entered the Ontario market in the early eighties. A warehouse complete with sales office opened in Ottawa in December, 1982; Willett leases these premises from Dominion. The Ottawa distribution centre sells supplies to restaurants, institutions and retail operations. The grocery stores in the Ottawa area supplied from this warehouse include independent retailers, some stores associated with two grocery chains that compete with Dominion, Dominion stores, and one Min-A-Mart. This warehouse was originally scheduled to open in 1986. But in 1981 when Dominion sold its distribution centre in Quebec — from which Dominion stores in the Ottawa Valley had been supplied — opening the Willett warehouse in Ottawa became a top priority; Mr. Gee testified Willett was told, presumably by Dominion, to open the Ottawa warehouse as soon as possible. Sales to Dominion stores in eastern Ontario comprise approximately one-half of the output of the Ottawa warehouse, according to Milford Sorenson, who is a vice-president of Willett. A second Willett wholesale facility in Kitchener began to service independent retailers and Min-A-Mart stores in October, 1983; this warehouse does not supply Dominion stores. Willett's Ontario offices are located at the same site as this plant. Willett voluntarily recognized Local 414 as bargaining agent for the warehouse employees at Ottawa and Kitchener; a QWL program has been established at both locations at the employer's suggestion and with the union's co-operation. Other operations carried on by Willett in Ontario include a few recently acquired food service companies — i.e., suppliers to restaurants and institutions — and one cash and carry facility.

5. The Dominion empire now extends beyond the food industry. Dominion owns 93 per cent of Labmin Resources Limited which in turn owns Hollinger Argus Limited among whose holdings are several mining companies.

6. In 1982, Dominion decided to close a substantial number of its retail stores and the Mr. Grocer concept was born. Management Horizons, an American consulting firm retained by Dominion, presented its report in June, 1982. The consultants identified several problems in the grocery industry and in Dominion's business: there were too many stores in the retail grocery trade; Dominion was bound by a "strict union contract" whereas independent retailers were typically not unionized; competitors who had a stronger base in wholesaling were better able to withstand price wars; many of Dominion's stores were too old and therefore unattractive; and competitors belonging to large buying groups were able to purchase supplies at a lower price than Dominion could. The range of solutions presented for Dominion's consideration included new vehicles such as warehouse stores and super stores; the consultants also suggested greater emphasis on wholesaling and on franchising in particular. According to Larry Gee, little happened between June and November because key people were on holiday in July and August and the president of Dominion was ill during the fall; then in late November a new president took office and the pace quickened. In addition to a new president, there were several other changes in the management structure at Dominion in late 1982 and early 1983 — 8 vice-presidents, 5 departmental directors and 2 district managers left. A decision was made in November to close a large number of Dominion stores. Some stores had been losing money for years; by late 1982, as the end of the third fiscal quarter approached, Dominion was suffering losses in approximately 110 of its 290 stores across Canada. If the situation had remained unchanged, the loss would have amounted to thirty million dollars annually. Dominion decided to close all losing stores as soon as possible over the next two or three years. In order to survive in the short run, Dominion pushed up its retail prices; at year end there was a loss of seven million dollars. Another economy measure taken was the selling of banked land.

7. Franchising was also being discussed at Dominion in November, 1982, as evidenced by a memorandum dated November 8th from Gee to the new president, John Toma. A franchise committee chaired by Larry Gee and manned by fellow Dominion executives, along with Walter Flewelling who is president of Willett, met on December 1 and 15, 1982 and again on February 9, 1983. The Mr. Grocer concept was developed by this committee. According to Gee, the stores slated to close would have been shut down as unprofitable even if there had been no franchising scheme; the closure decision was made before there was a final determination to immediately launch a franchise scheme. Gee testified the plan was always to assign the franchise operation to Willett; people at Dominion did the spade work because those at Willett were too busy at this time — they were establishing new facilities in Ottawa and Kitchener as well as taking over the recently acquired food service companies. The creation of Mr. Grocer as a division of Willett was approved by the executive committee of Dominion's board on December 22, 1982. According to Gee, Willett already had long-standing plans to launch a franchise scheme in Ontario to recover some of the expenditures sunk in the Ottawa and Kitchener facilities; these plans were accelerated when Dominion decided to close a large number of corporate stores because the vacated premises would have been lost if not put to immediate use. Willett has become the focus of franchise activity in the Dominion corporate family. Since 1983, Min-A-Mart stores have been supplied from Willett's warehouses in Ottawa and Kitchener; Min-A-Mart Ltd. now reports to Milford Sorenson at Willett. The predominant practice throughout North America, according to Larry Gee, is for corporations operating chain stores to assign franchise operations to a separate wholesale arm; the rationale for this division of management responsibility is that a franchisee is more of an entrepreneur than is a corporate store manager.

8. The abandonment of losing stores does not mean that Dominion intends to entirely cease retailing groceries through corporate stores. Larry Gee testified his company intends to continue to operate chain stores; indeed, this is to remain the dominant part of its business.

Entered in evidence was a map of the Toronto area showing locations for which new stores are being planned. In a memorandum dated February 23, 1983, Mr. Gee told his colleagues at Dominion about the franchising scheme which was being developed; the memorandum is entitled “Mr. Grocer, Willett Foods”:

By November 1982, Company profits had been so profoundly impacted by a growing number of smaller, inefficient stores, that a decision was made to move into franchising ahead of our plans to first have all of our wholesaling operations in place (e.g. 1986). This is not to say that the objective of our franchising program has changed from one of being “wholesale” driven to one of “asset” shifting, but rather that Dominion’s misfortune has presented a good opportunity for Mr. Grocer, which might not be there in two years.

Gee explained the purpose of this memorandum was to inform people at Dominion as to what was going on at Willett. Dominion’s annual report for 1983 describes the company’s retail activities in this way:

The Company is in the process of strategically covering the markets it serves with a combination of conventional Dominion supermarkets, Best for Less warehouse stores and franchised Mr. Grocer neighbourhood grocery stores. These three retail vehicles have been developed to continue Dominion’s prominence in the retail food sector.

9. Milford Sorenson took over responsibility for Willett’s Ontario operations, including Mr. Grocer, in May, 1983. Immediately prior to his arrival in Ontario, according to Sorenson, Mr. Grocer was managed by Bill Ashton and Ross Bletsoe; Gee testified Ashton stopped reporting to him in February. Ashton had been a member of Dominion’s franchise committee before he moved to Willett in April or May of 1983 to become director of administration for Mr. Grocer. Ross Bletsoe was enticed to leave the Oshawa Group — the leading IGA supplier in Ontario — in February or March of 1983 to join Mr. Grocer as director of franchising. Both Bletsoe and Ashton report to Mr. Sorenson; he answers to Willett’s president, Walter Flewelling. Four of the nine officers of Willett are Dominion employees, including one of two vice-presidents, the assistant treasurer and the three assistant secretaries. Willett’s board of directors was described by Larry Gee as “not active”. John Willett is chairman of the board; 4 of the 7 directors are employees of Dominion. Willett’s president reports to Larry Gee at Dominion and he in turn reports to Dominion’s board of directors twelve times each year — at 4 full-board meetings and at 8 meetings of the board’s executive committee. Once a year Dominion’s board reviews a three-year plan for Willett. Willett’s annual budget is approved by Dominion; quarterly reports on the subsidiary’s progress in relation to the budget are also submitted to the parent corporation. Any expenditure over \$50,000 that is not already a part of the approved budget is subject to scrutiny by Dominion’s board. (Dominion’s board of directors approved the building of Willett’s facilities in Ottawa and Kitchener as well as Willett’s recent purchases of existing businesses.) According to Sorenson, Dominion plays no part in the day-to-day operations of Willett. However, he testified Larry Gee is kept “fully informed” about Mr. Grocer; Sorenson described Gee as a “hands on guy”. Larry Gee testified he does not take part in the day-to-day operations of either Willett or any of the other seven subsidiaries — involved in businesses ranging from soft drinks to gas bars — that report to him; his responsibility is to ensure these companies produce a satisfactory rate of return on investment and he is little concerned about how they achieve this objective. The paper record

contains memoranda — dated after Sorenson's arrival in Ontario — to Gee about Mr. Grocer. In a memorandum dated April 5, 1983 and addressed to Larry Gee, Ross Bletsoe made several recommendations about the Mr. Grocer franchise scheme. According to Gee, he was not responsible for Mr. Grocer at this time; he said the only purpose of this memorandum was to convey information. In another memorandum dated May 5, 1984 and again addressed to Gee, Bletsoe listed prospective sites and franchisees — a copy of this memorandum was sent to Sorenson and Ashton among others. Larry Gee testified he has seen no such memorandum since that date. As well as being a vice-president of Dominion, Larry Gee holds the same title at Willett; however, according to Gee, his Willett title does not increase his responsibilities with respect to that company beyond those associated with his position at Dominion. Dominion continues to provide several types of services to Willett — data processing, legal and real estate; Willett pays for these services. Among the products offered by Mr. Grocer to franchisees are approximately one hundred red label lines sold to Willett by Dominion; Willett has for some years offered these products to non-franchised independent grocers. Willett's own distinctive logo appears on its trucks and buildings.

10. Dominion played a larger role in Willett's operations when it first moved to Ontario. The work of Dominion's franchise committee has already been noted. Until Willett's Kitchener facilities were opened in October, 1983, its Ontario offices were located at Dominion's headquarters in the same area as other associated companies. Three task forces manned by members of Dominion's management team and chaired by Sorenson were established to assist Willett set up its Ottawa and Kitchener operations. Initially, additional products supplied to Mr. Grocer stores — in particular store supplies and frozen foods — were purchased by Willett from Dominion; this practice was scheduled to end in January, 1984. In January 1984, Don Blair, then director of labour relations for Dominion, negotiated a collective agreement for Willett's Ottawa warehouse.

11. A number of former Dominion employees are now employed by Willett in Ontario. Sorenson left Dominion to join Willett in 1980. Bill Ashton's change of employer has been mentioned above. Several other Willett employees previously worked for Dominion: Bill Plate, plant manager at Kitchener; Danny DiFrancisco, produce manager at Kitchener; Bob Seguin, merchandising manager; V. Martin, merchandising manager at Ottawa since December 1981; J. Morris who joined Willett in the spring of 1983 and later became a Mr. Grocer franchisee; Bob Bell, a Mr. Grocer district manager; Doug Stickle and Mario Pivato, set-up co-ordinators; Bill Anderson, an advertising co-ordinator; Frank Brinkoff and Tom Stafford in merchandising at Kitchener; Jim Hill, a retail counsellor; Conrad Robert, a meat specialist; Laura Atherby, a cashier trainer; and Carol Robert. In addition, N. Kerr who formerly managed Superparket Limited, another Dominion subsidiary, joined Willett in the spring of 1983. Except for Ross Bletsoe — and perhaps one other — all of the people working in the Mr. Grocer division of Willett are former Dominion employees. Sorenson testified those who left Dominion to join Willett were not compelled or pressured to leave by Dominion; Willett has not made a job offer to an employee of Dominion without first asking its permission which is not always given; and Willett decided to whom job offers were made. Executive compensation and fringe benefit programs are the same at Willett as at Dominion.

12. In his evidence, Larry Gee explained why a franchise store can be more profitable than a corporate store. He contrasted an entrepreneur who is financially dependent on a family business with a corporate manager who can move to another store if one store fails. Gee described several ways in which a franchisee has a competitive edge in an industry where an after-tax profit of one per cent of sales is an acceptable rate of return. Unlike a franchisee,

a corporate store is burdened with the overhead costs associated with a large organization, amounting to 2.3 per cent of sales. An entrepreneur may also be able to curtail theft by both staff and customers, improve receiving practices to prevent overpayments to suppliers, reduce both under-pricing on the shelf and under-rings at the cash register and limit waste in the produce and meat departments. Gee estimated these methods of controlling “shrink” could save an amount equal to 2 per cent of sales. A corporate manager’s efforts to build a united team of employees is constantly disrupted by inter-store transfers, whereas a franchisee does not face this problem. Franchisees can also save money by employing relatives and by obtaining their family groceries at cost. Finally, Gee estimated the tax rate for a small business at 25 per cent as compared with 45 or 50 per cent for a large corporation. According to Gee, labour costs were a factor in the decision to franchise only to the extent that a franchisee might obtain greater productivity from employees than could a corporate manager. Larry Gee also explained what benefit a franchisor derives from a franchise arrangement. In addition to any franchise fees, the franchisor is of course paid for all supplies delivered to the franchisee. Moreover according to Gee, a franchise scheme benefits Dominion by allowing it to obtain greater volume discounts on supplies purchased for its corporate stores; the products supplied to Mr. Grocer stores and those purchased by Dominion for its own stores are bought through Volume 1 Inc., a buying group comprised of the Dominion and Steinberg corporate families.

13. Local 414 of the Retail, Wholesale & Department Store Union has been the bargaining agent for employees at the vast majority of Dominion stores in Ontario for many years. For the last fifteen years there has been a single collective agreement for Dominion employees represented by Local 414; at one time there were 43 separate agreements. The present agreement — running from October 17, 1982 to June 21, 1984 — recognizes Local 414 as bargaining agent for “employees of Dominion Stores Limited in its retail stores” in approximately sixty municipalities. The scope clause also provides:

Should the Company open stores within the townships set out in the attached schedule the Company will recognize the Union as the bargaining agent and such stores will be covered by this agreement. In the event that another union is the bargaining agent for one of the Company’s stores in a township adjacent to those set out in the above mentioned schedule, the matter of recognition will be decided by the Ontario Labour Relations Board.

Where a Regional Municipality is created and the Union has a certification in one of the areas incorporated, the Company will recognize the Union in the entire Regional Municipality provided no other Union has a certification in one of the areas incorporated. In the latter case, the Regional Municipality would be divided between the two Unions involved, or decided by the Ontario Labour Relations Board.

Under the current collective agreement, an employee in one store may exercise seniority rights to claim a job in another store, within a defined seniority area, in the context of a promotion, demotion, layoff, recall or transfer. The two largest seniority areas are in the Toronto area and each contains more than forty stores.

14. Larry Gee testified that in December, 1982 or January, 1983 he inquired if anything in the collective agreement would prevent franchising; he was told the only hurdle was “successor rights”. Although this information was relayed to Gee by Bill Ashton, Gee thought the source was Don Blair, Dominion’s director of labour relations. According to Gee, successor

rights was the only labour relations issue discussed by Dominion's board of directors. The minutes of the December 15, 1982 franchise committee meeting ended with an agenda for the next meeting scheduled for December 20th; among the topics listed is "union agreement". According to Mr. Gee, there was no meeting on December 20th and no discussion of the existing collective agreement at any franchise committee meeting. Gee testified Dominion had a positive attitude towards collective bargaining, citing the voluntary recognition of the union by Willett at Kitchener as evidence of this outlook.

15. Don Collins, Canadian director of the Retail, Wholesale and Department Store Union, first learned in November, 1983 that a large number of Dominion stores would be closing and that franchised stores were being contemplated. Although Collins was opposed to franchising of any kind, he told John Toma in December, 1982 that if there was to be franchising it should not be under the Dominion name. On January 14, 1983, Don Collins and two other union representatives met with Don Blair, Bill Ashton, Larry Gee and two other Dominion executives. As the spokesman for management, Blair said Dominion planned to close approximately 100 stores and to launch a franchise venture. Blair said the union would be recognized as bargaining agent at the franchised stores — or at least those that were formerly Dominion stores; but he went on to say the franchised stores could not be operated under the "rich" master agreement. According to Larry Gee, he then thought franchises would not be marketable unless relief was obtained from the union with respect to both wages and inter-store transfers; looking back, he did not believe the collective agreement has had any adverse impact. Don Collins undertook on January 14th to consider a proposed collective agreement for Mr. Grocer stores; a draft agreement was presented to him either then or a few days later. According to Collins, he rejected the proposal as unrealistic, saying he was prepared to deal if management took the matter more seriously. When Blair invited a counterproposal, Collins said he was tired of bargaining with himself but would consider an improved offer from management. Don Collins testified as to what troubled him about Blair's proposal. It excluded a number of jobs covered by the existing contract — department manager, chief clerk, bookkeeper and store porter. Substantial cuts in hourly rates were also proposed — for example, at the starting rate, a reduction from \$6.68 to \$4.37 for a clerk A and from \$11.49 to \$5.75 for a meat cutter. Inter-store transfers were also abolished. The agreement proposed by Blair was to be between the union and an individual franchisee and Collins was disturbed by the prospect of single-store bargaining. He thinks a consolidated bargaining structure increases the union's leverage at the bargaining table and reduces the administrative burden of negotiations. In his view, separate bargaining by Mr. Grocer franchisees would erode job security and bring about a loss of union members. Don Collins testified he has discussed Mr. Grocer with John Toma several times since January, 1983; Collins has sought a collective agreement applicable to all Mr. Grocer stores — including stores not previously operated by Dominion and future stores in areas covered by the current collective agreement. Although concession bargaining resulted in a stalemate in 1984, Dominion has obtained concessions from Local 414 in the past. Approximately four years ago when some Dominion stores were converted to Thrift stores and Best-for-Less stores, a special deal for these new ventures was struck and included as an appendix to the master agreement.

16. According to both Sorenson and Gee, franchisees operating in premises formerly occupied by Dominion have been told they have to live by the collective agreement until it is re-negotiated. This evidence is supported by the testimony of Gerald Penrose who is the leading actor behind Penmarkay, the first franchisee; Ashton told Penrose the existing contract would be binding on him. Willett offers to franchisees a benefit package for Mr. Grocer's employees that is substantially the same as the one contained in the collective agreement; Penmarkay has

adopted this plan which is administered by Confederation Life. Penmarkay initially paid all of its employees — including those who formerly worked at Dominion — the starting rate under the collective agreement. Penmarkay did not hire its employees from among those who had been laid off by Dominion; the store taken over by the franchisee had no employees at the time as it had been vacant for three months.

17. According to Milford Sorenson, Dominion's labour costs amount to between 11-1/2 and 12 per cent of sales. Several documents relating to labour costs at Mr. Grocer stores were introduced into evidence. The first document is a pro forma — a detailed projection of income and expenditures for a five-year term — presented to Gerald Penrose in March of 1983 when he was a prospective franchisee. Labour costs are shown as 10.5 per cent of sales in the first year and drop to 8 per cent in the second and subsequent years. (In absolute terms, labour costs are \$273,000 in the first year and \$220,490 in the second.) This projected reduction in labour costs coincides with an increase in the cost of leasing the store and its equipment from Willett; the rent for the first year is indicated to be \$7,000 and for later years \$68,000. (These are the amounts of rent fixed in the lease executed a few months later.) The pro forma also provides estimates of other expenditures: store services, customer services, franchise fees, taxes, insurance, interest, and legal and accounting services. On the other side of the balance sheet appears the margin — i.e. the difference between the amount paid by the franchisee to Mr. Grocer for supplies and the price charged to the consumer — for groceries, meat, produce and general merchandise. The bottom line shows the expected profit both before and after tax. In another pro forma for a store in Stratford, dated May 4, 1983, labour costs are shown as 10.5 per cent of sales in the first year and 8 per cent thereafter; rent increases from nil at the outset to \$77,583 in the second and subsequent years. The estimated after-tax profit on both pro formas shows a small but steady rise from the first to the last year. Sorenson testified the objective was to achieve the reduction in labour costs shown on these two pro formas through negotiations when the collective agreement expires at approximately the same time as the first year of the five-year period draws to a close. Attached to a third pro forma is the following caveat — the evidence does not disclose whether it accompanied the first two pro formas:

MR. GROCER does not represent or warrant that any prospective Dealer can expect to attain the sales volume, margins or profit shown on the pro forma statement on the reverse side hereof, or that he will have a profitable operation at the location being considered.

Rather, the prospective Dealer is cautioned that he cannot expect to have similar results unless he can attain similar sales and margins and maintain his cost of labour and other operating expenses within similar limits.

(This pro forma, dated January 10, 1983, estimates labour costs at a constant 8 per cent over the five-year term.)

18. Labour costs are also addressed in a memorandum written by Bill Ashton, dated April 25, 1983, copies of which were sent to Walter Flewelling and Larry Gee among others. It contains the following passage with respect to the franchisee as a "profit centre".

Pro formas show a 2% profit before tax after a manager's salary of 1% and costs associated with debt servicing 75% of capital required (inventory). To achieve the 2% profit, Mr. Grocer is required initially to assume some/all occupancy costs. However, all stores should bear all occupancy costs and

develop a 2% profit, after the location is decertified (union), when the wages and benefits drop from a current 11.5% to 9.0%.

Larry Gee could not recall reading this memorandum. Milford Sorenson disclaimed any assumption that franchised stores would soon be non-union, saying the issue of decertification was raised by franchisees. Another memorandum written by the same author and dated two days later states: "Presumably, the Mr. Grocer franchisee will be required by union contract to maintain all benefits outlined in the collective agreement." Also entered in evidence was a letter dated March 11, 1983, from Ross Bletsoe to Stephen Bartley who was then a prospective franchisee; attached to this letter is an estimate of labour costs totalling 8 per cent of sales. The hourly rates shown are substantially less than those set out in the collective agreement — the differential in the starting hourly rate for a clerk A is \$1.68 and for a meat cutter \$3.98. Some benefits found in the current contract are omitted. Larry Gee was not sure whether he had seen this letter before it was shown to him at the hearing; he was aware of its "flavour", although he did not know how the wage costs were calculated. According to Sorenson, Bartley thought he could cut a deal with the union more favourable than the current collective agreement and asked Ashton or Bletsoe to provide some guidelines to use in negotiations with Don Collins. Bartley did refer to Bletsoe's letter when he spoke to Collins.

19. The Penmarkay franchise opened at 666 Burnhamthorpe Road, Mississauga, on July 6, 1983. This store had been covered by a collective agreement between Local 414 and Dominion for many years, although it had been closed for three months when taken over by Penmarkay. Gerald Penrose was the president, sole director and only shareholder of Penmarkay when he testified in the fall of 1983. However, he had already arranged to take three former Dominion store department managers into the business as partners: Wayne Hamilton, Frank Wetselaar, and Bill Jackson. These three gentlemen were each to own 16 per cent of Penmarkay; they apparently perform the role of department manager in the new store. Neither Willett nor its corporate parent played any part in their decision to leave Dominion. Penrose had just retired as manager of the Meadowvale Dominion store when he was first approached by Bill Ashton in March, 1983. Penrose discussed a possible franchise arrangement with Ashton and Bletsoe at various times through March and April; negotiations broke down in May and Penrose returned the draft documents which they had provided to him. Then on May 27th the prospective franchisee received a call from Mr. K. Parkhill, a vice-president of Dominion who had served on the franchise committee and had known Mr. Penrose for many years. Upon meeting with Parkhill and Sorenson, Penrose got the answers he had been seeking; on the same day he spoke to Larry Gee who assured him of the wisdom of taking a Mr. Grocer franchise. According to Penrose, the initial impasse was over earned volume discounts and royalties. As to the royalties, Ashton proposed a fee of 3.85 per cent of sales and Penrose countered by suggesting a lower fee at the outset; the final agreement fixes the fee at 3.85 per cent. There was also some discussion relating to Mrs. Penrose. She was named as a party on draft documents including a franchise agreement, a lease, and a promissory note to Willett; but she is not named on the final documents. Throughout the negotiations over this franchise, Mr. Penrose was advised by his own lawyer. The formal franchise agreement, a lease and other related documents were executed in late June and early July. The franchise agreement was drafted by Coulson Mills, a solicitor employed by Dominion, and signed by Larry Gee as vice-president of Willett. As the premises were previously occupied by Dominion, the lease was assigned to Willett on July 5th, one day before Willett leased the store to Penmarkay.

20. Penmarkay was initially financed by a \$50,000 loan from Willett and a \$100,000 loan from the Toronto Dominion Bank guaranteed by Willett. Mr. Penrose has not invested

any of his own money; nor apparently have his partners. Gerald Penrose testified he would not mortgage his home for something that was untried. However, Penrose is a guarantor on the franchise agreement and on the promissory note setting out the terms of repayment for the money borrowed from Willett. Milford Sorenson explained that Willett assisted in the financing of Penmarkay in order to produce a “success story” which would help sell other franchises. For the same reason, Willett initially assumed some or all of the “occupancy costs” for the first few franchised stores. Penmarkay has six full-time employees and six part-time employees; three of the full-time employees previously worked for Dominion — one of the three had retired; but Dominion played no part in their decision to work for Penmarkay. Although the lease was not signed until July 6, 1983 when the store opened, Penmarkay was allowed access to the building on June 14th; renovations were then under way. Two dairy cases and five doors of a ten-door frozen food unit have been retained. The five checkout desks have been refurbished. Much new equipment has been added: a five-deck frozen poultry case; 48 feet of frozen food storage; 40 feet of self-service meat coolers; two produce display cases; five islands of grocery shelves; a full-service deli; and a bake-off complete with freezer, oven and merchandising cases. The store has also been repainted. Willett paid for all leasehold improvements and leases all of the equipment to Penmarkay.

21. The store at 666 Burnhamthorpe Road had been operated by Dominion as a Thrift store for the last two years before it closed in mid-March of 1983. In a Thrift store, grocery products are displayed in boxes, produce is stored in bulk containers and customers bag their own groceries. There is no fresh meat department or deli; there is not a bakery or even a bake-off to bake frozen goods. Over 7000 items are offered for sale by Penmarkay as compared to 3000 at a Thrift store.

22. According to the author of the franchise agreement, Coulson Mills, it does not vary substantially from the agreements used by IGA and Chrysler. The first paragraph of the franchise agreement describes in general terms the franchising package offered by Willett:

WHEREAS Mr. Grocer has developed an integrated marketing plan including a merchandising lay-out, a bookkeeping system and procedures, inventory and quality controls, advertising and promotional programs and centralized inventory purchasing and delivery for the operation of retail food supermarkets.

Mr. Grocer’s obligations to the franchise are described in the following way:

Mr. Grocer agrees to advise and assist the Dealer in operating the business of a retail food supermarket in the Premises, pursuant to a marketing plan or system prescribed by Mr. Grocer for the distribution, through independent franchised dealers, of a multiplicity of products obtained by Mr. Grocer from competing sources of supply and a multiplicity of suppliers, no one product being inordinately dominant in the business. Mr. Grocer will provide operating manuals to prescribe the marketing plan or system aforesaid and explain their use to the Dealer, and advise and assist the Dealer in:

- (a) setting up a bookkeeping system and procedures;
- (b) establishing inventory and quality controls;

(c) planning point of sale and neighbourhood advertising and promotional programs; and

(d) analyzing the efficacy of same from time to time;

Provided that the Dealer provides an adequate flow of relevant financial information to Mr. Grocer, as requested by Mr. Grocer, Mr. Grocer will analyze the Dealers's operations from time to time and compare the Dealer's operating results with those of Mr. Grocer's other franchised dealers and from such analysis and comparison advise and offer assistance to the Dealer and such other of Mr. Grocer's franchised dealers with respect, where possible, to reducing their costs, and improving their sales, margins and profits for their mutual benefit.

In exchange for this assistance, the franchisee pays a royalty in the amount of 3.85 per cent of net sales. The franchisee is also obliged to pay an advertising fee amounting to 0.75 per cent of net sales (article 3.4). These monies are to be applied towards the advertising and promotion of the Mr. Grocer marketing concept "in such manner and at such times as Mr. Grocer deems appropriate" (articles 3.4 and 3.5). The franchisor must provide to Mr. Grocer a weekly statement of retail sales (article 3.3).

23. All products and services offered for sale by a franchisee which are listed in Mr. Grocer's published price book must be obtained from Mr. Grocer. Products or services not available from Mr. Grocer may be acquired from another source only with the approval of Mr. Grocer as to both the nature of the product or service and the source of supply (article 8). The wholesale prices to be charged by Mr. Grocer to a franchisee for products or services are subject to change without notice (article 9). Mr. Grocer publishes a retail price book; a franchisee may charge less than specified in this book but not more (articles 12.1(m) and (n) and 13). Among the other obligations of the franchisee are the following:

- (1) to carry on business in an "efficient, reputable and business like manner" for its own benefit and also for the benefit of other franchisees (article 12.1(a));
- (2) to render to the public "courteous efficient and prompt service" (article 12.1(d));
- (3) to keep the premises in a "clean, healthful and attractive condition in accordance with Mr. Grocer's operating manual" (article 12.1(e));
- (4) to require employees to wear "the uniforms which are specified by Mr. Grocer" and to ensure "such uniforms are kept in a clean and attractive condition" (article 12.1(f));
- (5) to keep the premises open for business "during such hours and on such days as may be required by Mr. Grocer's head lease, if any, . . . and otherwise . . . during such hours and on such days as retail stores within the municipality . . . are generally open for business (article 12.1(g));

- (6) to maintain a balanced variety of merchandise having a total value . . . of not less than [\$180,000]" (article 12.1(h));
- (7) to provide "an adequate flow of relevant financial information to Mr. Grocer as requested by Mr. Grocer for the purposes of analysis" (article 12.1(i));
- (8) to participate in "such merchandising and advertising programs as Mr. Grocer deems appropriate" (article 12.1(m));
- (9) not to "borrow money or obtain credit" without the prior consent of Mr. Grocer (article 12.1(l));
- (10) not to be associated in any way with any other retail food store other than at the premises covered by the agreement during its term (article 14.1(a)); and
- (11) not to use the Mr. Grocer trademark in advertising without the prior approval of the franchisor (article 6.2(c)).

Mr. Grocer may inspect the store at any time during business hours to ensure the franchisee's premises and operations "are maintained at a high level consistent with Mr. Grocer's goodwill associated with the [Mr. Grocer trademark] and consistent with the quality required by the [franchise agreement]" (article 6.13).

24. The franchisee is described at several places in the agreement as an "independent franchised dealer". Mr. Grocer may require the franchisee to notify the public that it is an "independent proprietor". The franchisee may not contract on behalf of Mr. Grocer or pledge its credit (article 7). The agreement also states "nothing herein nor any acts of . . . parties hereto shall be construed to mean . . . the parties are carrying on business as a joint venture, in partnership as principal and agent . . . or under any relationship other than as independent contractors" (article 27).

25. The franchise agreement runs from July 6, 1983 to July 5, 1985 (schedule A). The franchisee may at its option extend the agreement for three additional one-year terms. In the event the agreement is extended in this way, the royalty and advertising fee are to be as then fixed by Mr. Grocer and the agreement is to be otherwise amended to correspond with the Mr. Grocer's current franchise agreement, save as to "any amendment which would vary substantively the rights and obligations of the parties" (article 24 and ryder A). The lease is for a five-year term but may be terminated by the franchisee if it elects to terminate the franchise agreement. The agreement carefully defines Mr. Grocer's right to require the franchisee to vacate the premises forthwith for failing to comply with its contractual obligations. This power may be exercised on the first occasion when the franchisee breaches certain obligations. In the event any other undertaking is violated, the franchisor must serve notice of default for a first or second violation of any particular obligation and allow the franchisee an opportunity to cure the defect; a third contravention is cause for immediate termination (article 16). By contrast, the franchisee may terminate the agreement on thirty days notice for any reason (preamble). However, the franchisee may not transfer any part of the business carried on under the agreement without the consent of Mr. Grocer — which consent may be unreasonably withheld (article 22.1). Penrose must hold a majority of the shares in Penmarkay. Neither he nor his

partners can sell their shares without the approval of Mr. Grocer; article 22.4(b) of the franchise agreement provides:

22.4 If the Dealer is a corporation then:

• • •

- (b) The Guarantor and the Dealer covenant and agree that no transfer by sale, assignment, pledge, gift or otherwise and no allotment and issuance of any shares in the capital stock of the Dealer or any corporation which controls the Dealer, directly or indirectly, will be made, except with the prior written consent of Mr. Grocer.

Upon termination of the agreement, the franchisee may not be associated with any retail food store for a period of six months within a radius of one mile of the store previously operated under the agreement (article 14.1(b)).

26. Approximately 75 per cent of Penmarkay's supplies are received directly from Mr. Grocer and most of the rest from approved suppliers. However, Penmarkay has not slavishly adhered to the franchise agreement, making occasional purchases from suppliers not approved by Mr. Grocer. According to Gerald Penrose, his store is open for slightly less hours in a week than are other supermarkets in the area. Penmarkay carries an inventory valued at \$140,000 — less than the \$180,000 minimum specified in the agreement. By December 1983, Penmarkay had not yet received an operating manual from Mr. Grocer. The computer payroll system offered by Mr. Grocer through the Toronto Dominion Bank is not utilized by Penmarkay.

27. Gerald Penrose compared his former job as manager of a Dominion store with his present position as a franchisee. Penmarkay now decides what merchandise to stock whereas a store manager, "by and large", follows the directions of Dominion's merchandising office. At Dominion, all hiring is carried out by the personnel office, and only the district manager can fire an employee, but Penmarkay hires and fires its own staff. A Dominion district manager plays a major role in determining the number of people who work in a store; Penmarkay sets its own staff levels. As a Dominion store manager, Penrose was paid a salary which was supplemented by a profit-sharing scheme of some type; he no longer receives a salary and all of the profits of Penmarkay accrue to him and his partners.

28. By the end of April, 1984, there were twenty-one or twenty-two Mr. Grocer stores in operation — including the model store at Markham where Dominion is the franchisee and continues to apply the collective agreement. All of the existing Mr. Grocer stores are in premises formerly occupied by Dominion. The time lapse between the closure of a Dominion store and the reopening of the premises as a Mr. Grocer store has ranged up to six months. Larry Gee testified Willett has a right of first refusal on any site abandoned by Dominion; according to Milford Sorenson, Willett is under no obligation to utilize any such site and has no say in Dominion's decision to close one of its stores. To date approximately fifty Dominion stores have been closed. Of those not franchised, eleven were sold to competitors — one in Ontario; landlords have blocked the assignment of several leases from Dominion to a Mr. Grocer franchisee. Over eight hundred full-time employees and more than eight hundred part-time employees have been laid off by Dominion. The combined work force of all Mr. Grocer stores numbers about six hundred. Approximately four hundred of these Mr. Grocer employees formerly worked at Dominion; some of them were on layoff when hired by a franchisee. Gee testified the plan is

to open 25 to 30 Mr. Grocer stores each year; he estimated that in the end between 30 and 40 Dominion stores will have been converted to Mr. Grocer outlets. According to Sorenson, Willett is pursuing two other types of sites in addition to those formerly occupied by Dominion: greenfield locations not presently used as a grocery store and stores affiliated with competing wholesalers. Sorenson testified on April 9th that two stores then being supplied by a competitor had agreed to convert but neither had yet made a binding commitment; by the end of April, one conversion was under way. A majority of the current franchisees are former Dominion store managers, according to Sorenson. Gee estimated this figure at 75 per cent; he testified that one half of those concerned moved directly from Dominion to a Mr. Grocer franchise. (Two of the existing Mr. Grocer stores are at sites previously covered by a collective agreement between Dominion and the United Food and Commercial Workers (UFCW)). Before Mr. Grocer was created, the UFCW had two collective agreements with Dominion in Ontario — one covering two stores and the other five. The two Mr. Grocer franchisees have now negotiated their own collective agreements with the UFCW. At least five IGA franchisees have separate collective agreements with a local of the Retail, Wholesale & Department Store Union.)

29. There are several provisions in the current master agreement between Dominion and Local 414 which reflect its scope of application to a large number of stores. The right of employees to move between stores has already been mentioned. Leaves of absence for periods longer than three days must be approved by the personnel manager at head office. Disputes over the scheduling of holidays for department managers are to be resolved by the district manager. A grievance committee is established for each area, not for each store. Disciplinary grievances are handled by the district manager rather than the store manager; all other grievances pass into the hands of the district manager at step two in the grievance process. There is a single negotiating committee made up of nine employees drawn from all stores.

II

30. The legal issues posed by these facts have already been identified. As noted above, Penmarkay did not dispute that a sale of a business had occurred within the meaning of section 63. Counsel for Penmarkay sought to escape both the union's bargaining rights and its collective agreement under section 63(5). Conceding there had been no substantial change in the work performed by employees, counsel relied upon the transformation of a store that was an integral part of Dominion's chain into a single-store operation owned by Penmarkay. He contended a province-wide collective agreement which was negotiated for a chain of stores was totally inappropriate for Penmarkay. In this regard, counsel cited several parts of the old contract: inter-store transfer rights, grievance and negotiating committees comprised of employees from several stores and the role played by management representatives above the level of store manager. Counsel also observed that this agreement defines the bargaining unit so as to include department managers, positions filled by Mr. Penrose's partners at Penmarkay. Counsel for the union contended that Penmarkay was not entitled to relief under section 63(5) because there had been no change in the work performed. In the event that the section 1(4) application fails, counsel conceded that the collective agreement should be interpreted so as to take account of both the substitution of Penmarkay for Dominion and the reduction in the number of stores operated by the employer.

31. Counsel for the union described the application under section 1(4) — to treat Dominion, Willett and Penmarkay as one employer — as the "bedrock" of his client's case. Unlike successor rights, a section 1(4) declaration would preserve the union's province-wide bargaining rights which apply not only to stores presently operated by Dominion, but also to

stores opened by it in the future. Counsel submitted that a consolidated bargaining structure furthered not only the interests of employees but also the public interest in industrial peace and uniform terms and conditions of employment. Turning to the relationship between Dominion and Willett, counsel emphasized the role played by Dominion's board of directors and executives in the launching of the franchise scheme and referred us to *Dominion Stores Limited*, [1978] OLRB Rep. Nov. 1013 and *Radio Shack*, [1979] OLRB Rep. July 689. As to the relationship between Willett and Penmarkay, several decisions were cited in support of the proposition that common ownership is not a prerequisite to the application of section 1(4): *Evans Kennedy Construction Limited*, [1979] OLRB Rep. May 388; *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531; and *Donald A. Foley Ltd.*, [1980] OLRB Rep. Apr. 436. We were urged to apply the test of real economic control enunciated in *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176. Counsel suggested that we ought to issue a section 1(4) declaration because the franchisor would otherwise be a ghost at the bargaining table by virtue of its ultimate control over the profitability of the franchisee. We were also referred to McGuire, "The Labour Law Aspects of Franchising" (1971), 13 Boston College LR 215 and White and Zaid (eds), *Canadian Franchise Guide* (Don Mills: Richard De Boo, 1983). Counsel for the union stressed Willett's part in the financing of Penmarkay and the provisions in the franchise agreement relating to the operation of the Penmarkay store.

32. Counsel for Penmarkay reminded us that there was no overlap in ownership, directors or officers between Penmarkay and Willett or Dominion. He also contended that neither Dominion nor Willett exercised any control over labour relations at Penmarkay. We were referred to two decisions in which the NLRB declined to treat a franchisor and franchisee as one employer because the former exercised no control over the latter's labour relations: *Southland Corporation*, 170 NLRB 159 (1968) and *S. G. Tilden Inc.*, 172 NLRB 752 (1968). Counsel also relied upon *Victoria Dodge*, [1984] 1 CLRBR 37 in which the British Columbia Labour Relations Board refused to issue a related employer declaration in the context of a franchise; the Board found that the franchisor did not control the franchisee because it could terminate their relationship on thirty days notice. Counsel for Penmarkay urged us to exercise our discretion under section 1(4) by refusing to issue a declaration on the same grounds as he sought relief under section 63(5). Counsel for Dominion and Willett contended that these two companies are not under common control or direction; he relied upon *Diversey (Canada) Limited*, [1978] OLRB Rep. Sept. 814. Referring to *Diversey (Canada) Limited*, *supra*, and *Brant Erecting and Hoisting*, [1980] OLRB Rep. June 16, counsel also contended that the activities of Dominion and Willett are not associated or related, as Dominion operates a chain of retail stores and acts as a holding company for several mining firms, whereas Willett wholesales supplies to independent grocers and franchisees. As to the relationship between Willett and Penmarkay, counsel submitted that the franchisor exercised no control over the franchisee's retail operations or labour relations; the right of the franchisee to terminate the relationship on thirty days notice was again emphasized. Counsel also argued that the activities of Willett and Penmarkay are not associated or related. In addition, he submitted that treating all franchisees as one employer would produce labour chaos because each would be determined to shape its own labour relations; he also contended that Dominion and Willett ought not to be compelled to bargain together because they are competitors.

33. There remains to be summarized the arguments relating to the section 89 complaint alleging a violation of sections 50, 64, 66 and 67. Counsel for the union contended that one of the reasons Dominion decided to embark upon a franchise scheme was to unilaterally obtain relief from the collective agreement. He argued that this conduct amounts to an unfair labour practice, relying upon *Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577 and *Interna-*

tional Association of Bridge, Structural and Ornamental Ironworkers, [1982] OLRB Rep. Oct. 1487. Counsel for Dominion and Willett contended that labour costs played no part in the initiation of the franchise scheme, a decision which was made only after Dominion decided to close the stores in question.

III

34. When a business is sold, the general thrust of section 63 is to preserve both bargaining rights and contractual commitments by substituting the successor employer for its predecessor. However, the Board may grant relief to the successor if the character of the business undergoes a substantial change, pursuant to section 63(5):

The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

35. Only a change that bears upon labour relations can trigger section 63(5). The introduction of a new menu and decor in a restaurant may have great significance for customers but is not a reason to terminate a collective bargaining relationship. See *Winco Steak N' Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788. Conversely, the Board has suggested such a relationship may be terminated when there is a radical change in the work performed by employees. In *Winco Steak N' Burger Restaurants Limited*, *supra*, the test was put this way:

24. The implementation of subsection 5 of section 55 [now 63] involved the revocation of the remedial effects otherwise flowing from the provisions of section 55 [now 63] of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words “substantially different” must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review.

See also *Jimmy'Z II*, [1977] OLRB Rep. Sept. 572 and *Vivace Tavern Inc.*, [1982] OLRB Rep. Aug. 1224.

36. But not all changes that affect labour relations give rise to section 63(5) relief. Often the successor's business differs in size from the one formerly operated by the predecessor because it sold only a part of its business, — as occurred in the instant case. A collective agreement negotiated for the original business is rarely a perfect fit for the portion sold. Yet the general thrust of section 63 is to continue a collective bargaining relationship in this context, despite the reduction in the scope of the business; section 63(1)(a) makes this clear by explicitly

stating a “business” includes “a part thereof”. In *Vaunclair Meats Ltd.*, [1981] OLRB Rep. May 581, in precisely this context, the Board refused to wipe out a collective agreement simply because there might be problems in implementing it (at paragraph 30):

Every collective agreement negotiated for a “whole” will be more or less appropriate when applied to a part. Job descriptions may need to be modified, and some may be entirely redundant. Grievance procedures may be too simple or too complex. Contractual provisions respecting union stewards or safety committees may not fit well in the new circumstances. If the agreement provides a means for dealing with these issues, it must be followed. If it does not, then the employer can probably act unilaterally.

To these comments we add one remark. As conceded by counsel for the union, a strict literal interpretation of the collective agreement must yield to a commonsense reading that takes account of the change in both the identity of the employer and the scope of the bargaining unit.

37. In the case at hand, there has been no change in the nature of the work performed. With the above observations concerning how the collective agreement is to be administered in mind, we decline to grant relief under section 63(5).

IV

38. We turn now to the related employer aspect of this case. Section 1(4) states:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

39. The discretionary power to treat two or more entities as one employer can only be exercised where two criteria are satisfied: the entities concerned must be under “common control or direction” and they must carry on “associated or related activities”. When both of these criteria are met, the Board issues a section 1(4) declaration if there are sound industrial relations reasons for doing so. Standing alone phrases like “common control or direction” and “associated or related activities” are linguistically capable of bearing more than one interpretation. Is one to look to “control or direction” over business matters in general or over labour relations in particular? Should the focus be on the setting of general policy or the making of day-to-day decisions? Does “control or direction” imply the ultimate legal authority that resides in ownership of a business? Presumably the words “associated or related activities” connote a connection different in nature than that inherent in common control or direction. Several types of association or relationship spring readily to mind. An interchange of employees between two enterprises is one possible way of tying them together. Next there is the functional nexus between firms whose production processes are integrated — for example, a pulp mill that supplies raw material to a box factory. Two commercial entities serving the same market

demonstrate another sort of link. Which type of connection is to be the litmus test? The only way to answer these questions and to assign a precise meaning to the statutory criteria is by reference to the policy objectives underlying the statutory language.

40. Section 1(4) is designed to accomplish at least three purposes:

- (1) One objective is to prevent the erosion of bargaining rights. Take a case in which a union is certified to represent the employees of a firm; as soon as certification is granted, the proprietor redirects work to another enterprise. Treating both corporations as one employer preserves the union's bargaining rights. The large numbers of cases in this category include *Dominion Stores Ltd.*, *supra*; *Radio Shack*, *supra*, and *Great Atlantic and Pacific Company of Canada*, [1982] OLRB Rep. Mar. 386.
- (2) Section 1(4) also removes roadblocks to viable structures for collective bargaining. For example, on an application for certification, the Board may include the employees of two companies in a single unit. See *Walters Lithographing Company*, [1971] OLRB Rep. July 406 and *Diversey (Canada) Ltd.*, *supra*. For a case in which a related employer declaration was issued at the instance of management, see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. Mar. 247.
- (3) Another function of section 1(4) is to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them rather than with someone else who is their employer in name only. See *J. H. Normick Inc.*, *supra*, and *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008.

41. These legislative objectives — preservation of bargaining rights, viable collective bargaining structures, and direct dealings between bargaining agent and the entity with real economic power over employees — illuminate the meaning of the dual criteria found in section 1(4). Consider first “common control or direction” in the context of an alleged erosion of bargaining rights. To construe this criterion as requiring a nexus through ownership would be to preclude the fulfillment of legislative objectives, as illustrated by *Evans-Kennedy Construction Limited*, *supra*. Mr. Kennedy was the major shareholder and active manager of Evans-Kennedy, a unionized general contracting firm. On Mr. Kennedy's advice, Ms. Potter, a close personal friend with no knowledge of the construction industry, incorporated a general contracting company called Celtic of which she became the sole owner; again at Kennedy's suggestion, Potter hired Evans-Kennedy's former field superintendent to be Celtic's general manager. Evans-Kennedy's personnel did all of Celtic's administrative work, accounting, purchasing and bid preparation, and Celtic utilized Evans-Kennedy's equipment. Kennedy decided what work Celtic would sub-contract and to whom; he also redirected one customer from Evans-Kennedy to Celtic. Evans-Kennedy was paid for its services by Celtic on a “cost plus” basis, but Ms. Potter was protected against any loss by an understanding that this payment would never exceed the amount Celtic received from a client. Celtic was owned by Ms. Potter. But the company was created at Kennedy's suggestion and served as a vehicle through which Evans-Kennedy operated union-free. The Board issued a section 1(4) declaration to preserve the bargaining rights that initially bound only Evans-Kennedy by extending them to Celtic. See also *Kustom Insulation Ltd.*, *supra*, and *Donald A. Foley Ltd.*, *supra*.

42. When the objective is to preserve bargaining rights in cases involving a parent company and a subsidiary, the “common control or direction” criterion has been interpreted not to require parental management of either the offspring’s day-to-day affairs or its labour relations. The reason is obvious. A unionized parent company which sets general business policy for all members of the corporate family and reaps the rewards of their activities ought not to be allowed to circumvent bargaining rights by diverting customers to a non-union subsidiary. Two companies — a parent corporation and its wholly-owned subsidiary — were the subject of a section 1(4) declaration in *Dominion Stores Limited, supra*, even though a manager employed by the offspring was in charge of regular day-to-day decisions and there was no evidence of the parent being involved in the subsidiary’s labour relations. The parent had advanced a start-up loan to the subsidiary, approved its capital plan each year, and reviewed its operating results on a quarterly basis; policy decisions on general business matters were made by a vice-president of the parent corporation. In *Diversey (Canada) Limited, supra*, there was no coordination of either the day-to-day management of operations of a parent company and a subsidiary — 60 per cent of which was owned by the parent — or the establishment and administration of labour relations policy at the two companies. Despite this separation, the existence of common directors, officers and financial control led the Board to conclude the statutory test was satisfied. See also *Radio Shack, supra*.

43. A company purporting to be the employer and another exercising overwhelming economic power over it have been treated as one in order to facilitate meaningful collective bargaining, even though there was no overlap in ownership. In *J. H. Normick Inc., supra*, the union applied to be certified as bargaining agent for employees engaged in cutting and skidding timber in Midlothian township. The timber rights were owned by J.H. Normick Inc. (“Normick”) and the cut trees were processed in its plants. Normick contended the cutters and skidders were not its employees. Each of them was party to a contract with Leo-Paul Turgeon who in turn was under contract to Normick. Mr. Turgeon hired them on the recommendation of Normick for whom they had previously worked. Normick paid Turgeon at a piece-rate and — without consulting him — fixed the piece-rate at which he paid the cutters and skidders. The count by which payment was made at both levels was verified by Normick. Normick supplied all equipment required by Turgeon and transported the skidders owned by the employees. For a time, Normick also provided supervisory and bookkeeping services. The contract between Normick and Turgeon could be terminated by either of them on thirty days notice. The Board found Turgeon to be under Normick’s control.

44. This decision was followed in *Don Mills Bindery Inc., supra*. This case arose out of a decision of Thorn Press Limited (“Thorn Press”), a company offering a full range of printing and related services, to close its bindery department. The bindery foreman, on his own initiative, incorporated Don Mills Bindery Inc. (“Don Mills”), rented from Thorn Press the space previously occupied by its bindery department — on a month-to-month lease — and hired its former employees. He used the equipment owned by Thorn Press — valued at \$250,000 — rent-free at its pleasure. Thorn Press had previously performed 90% of its bindery work on its premises; Don Mills did 80% of this work. Binding for Thorn Press constituted more than 90% of Don Mills’ business. Don Mills was paid for this work at competitive rates — less a 5% service charge in lieu of rent for the use of Thorn Press’ equipment. In this case, unlike *J. H. Normick Inc.*, there was no evidence that anyone except the nominal employer was directly involved in hiring employees or in determining their terms and conditions of employment. However, Thorn Press was held to exercise effective control over Don Mills. The Board stressed the high percentage of Don Mills’ work done for Thorn Press, the use of its premises and equipment, and its ability to terminate the arrangement on short notice. In neither of these

cases was a section 1(4) declaration necessary to preserve bargaining rights. The union in *J. H. Normick Inc.*, had none for the township in question. In *Don Mills Bindery Inc.*, the union had been certified to represent the employees of Thorn Press, but the Board noted these bargaining rights could have been preserved by finding a sale of a business to have occurred. The purpose of a section 1(4) declaration in both cases was to bring about collective bargaining between employees and the entity exercising real economic control over their working lives.

45. The “associated or related activities” test has also been liberally construed. When bargaining rights are at risk, firms have been found to meet this standard on the grounds that they served the same market. Two companies were found to be engaged in “associated or related activities” in *Valdi Inc.*, [1979] OLRB Rep. Aug. 833 because both sold groceries to consumers. See also *Evans-Kennedy Construction Limited*, *supra*. This interpretation recognizes that bargaining rights are eroded by shifting customers from one firm to another — even though there is no interchange of employees between the two or any integration of their production processes.

46. This criterion has been applied in a different way when the objective is to foster direct dealings between a union and the entity with real economic power over them. In *J. H. Normick Inc.*, *supra*, Normick’s wood processing plants were found to be “associated or related” to Turgeon’s tree cutting and skidding operation because the two businesses were functionally integrated, one supplying raw material for the other. The Board recognized that two firms need not produce the same product for one to effectively control the other.

47. Dominion and Willett are obviously under “common control or direction”. Dominion owns Quintana Inc. which in turn owns Willett. As Willett’s board of directors is inactive, Dominion’s directors review Willett’s capital plans and operating results. Executives at Dominion played a large part in deciding in late 1982 to launch a franchise scheme through Willett. See *Dominion Stores Limited* and *Diversey (Canada) Limited*, *supra*.

48. The dealings between Willett and Penmarkay are much more difficult to characterize. There is a sphere of commercial activity within which Penmarkay is its own master. Penmarkay decides what merchandise to order — subject to its obligation to buy from either Willett or approved suppliers, to participate in promotional campaigns, and to carry a balanced inventory exceeding a specified minimum value. Penmarkay may set its own retail prices — subject to both a ceiling and to participation in promotional campaigns. In-store merchandising is controlled by Penmarkay. Penmarkay sets its own staff levels, hires and fires its employees and establishes their terms and conditions of employment.

49. But Willett’s brooding presence is graphically illustrated by the pro forma — produced by the franchisor during negotiations with Penrose — viewed against the background of the franchise agreement and lease. By fixing wholesale prices and maximum retail prices, Willett effectively determines Penmarkay’s margin — or gross profit — on each case of merchandise. Total gross profit is a function of not only the profit per unit but also the number of units sold. Penmarkay can enhance its sales by selecting the appropriate products, by displaying them in an attractive way, by reducing its “shrink”, etc. Willett is also involved in fixing the level of many of the expenditures that fill the gap between Penmarkay’s gross profit and its net profit: including (1) the franchise royalty, (2) the advertising fee, (3) rental for both premises and equipment, and (4) interest payments on the \$50,000 loan. On the pro forma, these four expenses constitute approximately one third of all costs — income tax aside — to be paid out of gross profits in the second and subsequent years. Willett’s power to fix the margin

on a case of groceries together with its influence over the enumerated expenditures strongly affects the amount Penmarkay can afford to pay its employees. The part played by Willett is dramatically illustrated by the changes shown on the pro forma from the first year to the second. Willett took the view that Penmarkay was bound during its first year of operation by the collective agreement negotiated by Dominion. Labour costs for this period are estimated to be 10.5 per cent of sales. To allow an adequate net profit in that year, Penmarkay's rent (\$7,000) was heavily subsidized by Willett. In the following year after the agreement has expired, a much higher rent (\$68,000) is payable. Labour costs are predicted to drop 8 per cent so as to maintain roughly the same net profit. There would be no net profit if labour costs stay above 10 per cent with the higher rent and everything else unchanged. Penmarkay will be under strong pressure to bring its labour costs into line with the pro forma estimate in order to be profitable. There will of course be more room to manoeuvre on hourly rates than on labour costs as a percentage of sales. By increasing labour productivity, Penmarkay could raise its wage rates correspondingly with no impact on profits; productivity could be enhanced by careful hiring, effective supervision, efficient scheduling, etc. But the point at which higher wages reduce profits is soon reached.

50. The influence Willett exercises over its franchisee is thrown into relief by comparing Penmarkay with a truly independent grocer. A small independent has only limited control over how much is spent for supplies, rent, etc; and consumers are willing to pay only so much. In short, market forces put a lid on the wage rate which an independent can afford to pay and remain in business. But there is an important difference between an independent grocer and Penmarkay. The influence exercised over an independent comes from diffused sources — suppliers, landlord, consumers and others — and the independent decides how to respond to these market signals. In the case of Penmarkay, all of these influences are funnelled through Willett; it sets maximum retail prices and, on the other side of the balance sheet, wholesale prices, rent, etc. These determinations are made with a labour cost target in mind — a target selected by Willett to further its own interests. The cumulative effect of all of the decisions made by the franchisor leaves little discretion to the franchisee in setting terms and conditions of employment.

51. Willett also plays another role. It designed the benefit package offered to franchisees through Confederation Life. Although not obliged by the franchise agreement to adopt this plan, Penmarkay has done so for the obvious reason that there are economics of scale to be realized by applying the same package to a number of stores. But the result is that management control over the shape of the package is shared among Willett and several franchisees. Willett played the dominant part at the outset and will probably do so in future.

52. In our view, Penmarkay is controlled or directed by Willett within the meaning of section 1(4). We have consciously focused upon the influence which Willett exercises over Penmarkay pursuant to the franchise agreement. As the agreement is likely to remain in force for some years, the life of the franchise is our temporal frame of reference; the absence of any common control after the franchise comes to an end is not relevant to our present determination. Nor are we persuaded that Penmarkay's right to terminate the franchise on thirty days notice negates Willett's control during its term. Viewed in the context of the entire arrangement, this legal right is subject to very real constraints. Termination of the franchise would leave Penmarkay with few options. No part of Penmarkay's business may be transferred without Willett's consent which may be unreasonably withheld; Penrose and his partners cannot sell their shares without approval from Willett. Given these constraints, the right to terminate does not offset the persuasive influence Willett is able to assert over Penmarkay. Our conclusion

is consistent with the Board's ruling in *J. H. Normick Inc.*, supra, where both parties could cancel their contract on thirty days notice. Without commenting on Turgeon's right to terminate, the Board said: "the power of Normick to terminate on short notice is a compelling indicia of economic control". We respectfully decline to follow the British Columbia Labour Relations Board's decision in *Victoria Dodge*, supra, holding that a franchisee's right to terminate on thirty days notice precludes control by the franchisor.

53. Dominion, Willett and Penmarkay are engaged in associated or related activities. As to Willett and Penmarkay, their operations are functionally integrated. Taken together, Willett as wholesaler and Penmarkay as retailer compete with Dominion whose major activities are distributing and retailing groceries.

54. Having found these three corporations to satisfy the dual criteria contained in section 1(4), ought we to exercise our discretion by declaring them to be one employer? Is this outcome consistent with the purposes underlying the statute? At this point in time, a section 1(4) declaration is not required to preserve bargaining rights insofar as Penmarkay is concerned. Such rights would be fully protected by declaring Penmarkay to be a successor to Dominion. As a successor employer, no less than as a related employer, Penmarkay would be obliged to both recognize the union and apply the current contract at any stores operated within the geographic boundaries of the bargaining unit.

55. Declaring Penmarkay, Willett and Dominion to be a common employer would bring the franchisor to the bargaining table. The franchisor would then be required by section 15 to meet with the union and to bargain in good faith; it would be subject to the economic sanctions normally faced by an employer in the course of collective bargaining. In this way, the union would be afforded an opportunity to persuade the franchisor to expand the franchisee's margin or to reduce the franchise fees in order to permit higher wages. A forum would also exist for discussions about the structure of the benefit package. In short, the union would have access to the real locus of power as it did when the store in question was operated by Dominion. The logic of the Board's decisions in *J. H. Normick Inc.* and *Don Mills Bindery Inc.*, supra, provide one reason for issuing a section 1(4) declaration.

56. There is another, secondary reason for granting this relief rather than leaving the union to deal separately with several successor employers. When operated by Dominion, the store on Burnhamthorpe Road was part of a province-wide bargaining structure. A change in legal form, such as a franchise scheme, which does not shift the seat of real economic control ought not to break up a bargaining structure created by the parties through the process of collective bargaining. In other words, the province-wide bargaining structure merits preservation primarily because it is the *status quo* fashioned at the bargaining table. A consolidated structure also has public interest attractions, given the existence of common control. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations. And centralized bargaining is more likely to be conducted by professionals whose experience may enable them to avoid pitfalls. Industrial unrest may be heightened by competitive bargaining between two unions; and several small units enhance the probability a rival union will appear on the scene. A broadly-based structure may lower the cost and thereby enhance the availability of insurance and benefits plans. Finally, the existence of a single unit facilitates equitable treatment of employees doing the same job. A related employer declaration could only serve to increase the probability that broad-based negotiations will continue. On an application for certification, the Board has used section 1(4) to create a viable bargaining structure. In our view, the

preservation of a consolidated bargaining structure created by the parties is an equally compelling reason for a related employer declaration.

57. By involving Willett directly in labour relations, a section 1(4) declaration might reduce somewhat the autonomy franchisees would otherwise enjoy. But even in the absence of a section 1(4) declaration, the franchisor will be a very influential ghost at the bargaining table. And a related employer ruling need not prevent Willett from agreeing with franchisees not to invade territory now ceded to them. Moreover, Willett and Penmarkay would remain free to bargain for different terms for Mr. Grocer employees than apply at stores operated by Dominion.

58. The conclusion we have reached ought not to surprise the labour relations community in Ontario. White and Zaid, *supra*, at 2-626, recognized the potential of section 1(4) in the context of franchising:

This broadly drafted subsection was enacted to deal with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act is carried out by or through more than one legal entity. The Labour Relations Board is empowered to pierce the corporate veil where such legal entities carry on related business activities under common control or direction. The provision is designed to ensure that the institutional rights of a trade union and the contractual rights of its members will attach to a definable commercial activity rather than the legal vehicles through which that activity is carried on. There is no doubt, in proper circumstances, that a franchised operation could fall within the ambit of the section and a franchisor and some or all of the franchisees be deemed to constitute one employer for the purposes of the application of the *Labour Relations Act*.

Turning to the American scene, we are not inclined to follow in the footsteps of the National Labour Relations Board. As there is no analog to section 1(4) in the *National Labour Relations Act*, an "alter ego" doctrine has been fashioned by the Board to pierce the corporate veil, as an interpretative gloss on the statute. See Morris (ed.), *The Developing Labor Law* (Washington: Bureau of National Affairs, 1983), at 735-740. For obvious reasons, an administrative agency may be reluctant to extend very far a concept developed without legislative approval. Moreover, we believe the National Labour Relations Board, in the cases cited above, has drawn a false dichotomy between control of labour relations and general economic control. The latter often entails the former as this Board recognized in the other cases discussed above.

59. We have decided to issue a section 1(4) declaration for two reasons: to facilitate meaningful collective bargaining between employees and those exercising real economic control over them; and to maintain a consolidated bargaining structure.

V

60. Counsel for the union sought the following relief under section 1(4):

(1) a declaration that Dominion, Willett and Penmarkay are one employer;

- (2) a declaration that Willett and Penmarkay are bound by the collective agreement negotiated by Dominion;
- (3) a direction that all three companies comply with the collective agreement;
- (4) damages for all union members who have suffered losses through a contravention of the collective agreement; and
- (5) a direction requiring the recall of all employees improperly laid off or terminated.

In support of these requests, counsel referred us to the Board's power, pursuant to this section, to "grant such relief, by way of declaration or otherwise, as it may deem appropriate". We declare that Dominion, Willett and Penmarkay are one employer within the meaning of the Act in respect of the Mr. Grocer franchise. We further declare that Willett and Penmarkay were bound by the collective agreement negotiated by Dominion. The union's entitlement to the other remedies requested hinges upon an assumption that the collective agreement has been violated. We believe that whether a violation has occurred is a question best left to arbitration.

61. This disposition of the section 1(4) application renders the union's section 63 proceeding entirely redundant. From a remedial point of view, the section 89 application is now largely superfluous. The damages sought for any contravention of the collective agreement can be recovered in arbitration. Even if the unfair labour practice complaint succeeded, we would not grant the request for an order directing Dominion and Willett to inform all prospective franchisees that they would be bound by a subsisting collective agreement. The legal position of a franchisee depends upon the application of sections 1(4) and 63 to the particular situation. For example, the case of an independent grocer with an existing business who became a Mr. Grocer franchisee would raise very different considerations than this application. The only other relief sought under section 89 is a declaration of a violation and either a posting or a mailing. In these circumstances, we decline to address the merits of the section 89 complaint.

DECISION OF BOARD MEMBER JAMES A. RONSON;

I

1. By this decision, the Ontario Labour Relations Board concludes that its enabling legislation deems ALL franchise operations to be under common control and direction as between franchisor and franchisee. The facts of this case dictate that conclusion, for I doubt that any franchise relationship is more at arms-length than that found between Dominion Stores Ltd. ("Dominion"), Willett Foods Ltd. ("Willett"), and Penmarkay Foods Ltd. ("Penmarkay").

2. Furthermore I feel my colleagues have failed to address one of the fundamental issues in this case. Together with its application under section 1(4) of the Act, the applicant union also alleged: (a) unfair labour practices against Dominion and Willett (sections 50, 64, 66 and 67 of the Act); and (b) a sale of a business from Dominion and Willett to Penmarkay (section 63 of the Act). It seems to me that sections 63 and 1(4) are mutually exclusive and if there has been a *bona fide* sale within the meaning of section 63, then there can be no finding of common control as defined in section 1(4). We must first determine if there was an arms-length

transfer to a new employer. If there was no arms-length transfer or if there was a sham transaction then section 1(4) and the unfair labour practice charges come into play (i.e., was there an attempt by Dominion and Willett to escape from the terms of the collective agreement with the union). In my opinion one thing is certain from the evidence — there was a transfer or sale of part of a business to Penmarkay. Penmarkay admitted such a sale, the union alleged it, and Dominion and Willett by their actions treated the franchise to Penmarkay as a sale under section 63.

3. The application of section 1(4) by the Board requires a finding of actual or *de facto* control. There is no actual control of Penmarkay by Dominion or Willett. What are the facts that could result in a finding of *de facto* control?

II

4. THE NEGOTIATIONS: Gerald Penrose is the sole director and shareholder of Penmarkay. Previously he had been employed by Dominion for thirty-five years, ending up as one of its premier store managers responsible in part for opening “flagship” stores in new shopping plazas. He retired in February 1983.

5. In March 1983 Willett approached him to “sound him out” about becoming one of the first franchisees for its Mr. Grocer system. In late March at his retirement party, he mentioned the concept to various people and three of his ex-colleagues asked if they could come in with him. Wayne Hamilton would be meat manager, Mike Forgione the produce manager, and Frank Wetzlaar the grocery manager. The plan was that eventually they would “buy in” as shareholders. After further discussion it was agreed that Mr. Penrose would take fifty-two shares and each of the others would be entitled to buy sixteen shares each. Mr. Penrose strongly objected to the suggestion that he stole these men from Dominion. He knew their ability, he needed ability for his franchise to succeed and they wanted to work with him. It was a “heavy” decision for them as they would have to leave the Dominion pension plan and “I couldn’t disclose their names to Willett or Dominion while they were deciding”.

6. Negotiations with Willett continued to May 26, 1983, when an impasse was reached. Mr. Penrose wasn’t satisfied that the franchise terms were fair to him. He refused to provide his home and other assets as collateral for a line of credit from the bank. He was willing to provide only his personal guarantee to the bank. He was also concerned about royalties, about earned cash rebates (“ECR’s”) and about what input Willett would have into his operations. He was unwilling to have anyone in Dominion or Willett telling him what to do — as he put it “NO WAY, NO WAY, I RETIRED!”.

7. Mr. Penrose was so upset with the negotiations that he returned the documents and “walked away” from the deal. He told Willett that, “I wasn’t prepared to fill someone else’s pocket.” Through new negotiators, Willett put out peace feelers and talked Mr. Penrose back to the table. They needed his expertise for one of their first Mr. Grocer franchises to be successful and serve as a sales model for others. Mr. Penrose got the answers to his questions and the deal that he wanted. He gave his personal guarantee to the bank and Willett ended up as guarantor of the debt. When asked if it was normal to get such a guarantee he said it was not “but I wouldn’t mortgage my home for something that was untried. I was willing to try it but not at the risk of my future and my wife’s future.”

8. Mr. Penrose understood during negotiations that he would have to pay his employees the wage rates and provide the benefits as set out in the collective agreement between Dominion and the union.

9. Thus Mr. Penrose went into competition with Dominion. He felt he could make a success by providing a cleaner store, better service and closer contact with his customers.

10. It is a rare happening, I think, when a franchisee can and does say “take it or leave it.” Mr. Penrose got the bargain that he wanted, and not what Willett wanted to give. I find no evidence of superior bargaining power by Willett, but quite the opposite. *De facto* control cannot be found in this set of negotiations.

III

11. THE BUSINESS RELATIONSHIP BETWEEN DOMINION, WILLETT AND PENMARKAY: Dominion has no business dealings with Penmarkay. Dominion and Willett have no actual control over the day to day business of Penmarkay. Mr. Penrose runs his own business — he hires and fires staff, sets hours of work and deals with all labour relations matters in the store. He determines the price at which he will sell the goods that he has purchased from Willett. Apart from the franchise arrangement it is like any other business operated by a sole entrepreneur. The result is that *de facto* control by Willett and Dominion, if present, must be found in the franchise documents.

12. Willett and Penmarkay have entered into the usual and ordinary type of franchise arrangement. Willett provides location, facilities, product, merchandising concept and know-how (although Mr. Penrose and his key employees are so experienced that they have little need of the latter). I do not intend to get into the “nuts and bolts” of the documentation — that would only be another examination of a standard franchise arrangement — and the majority have already conducted that examination. From my experience representing franchisees before coming to the Board, this franchise arrangement is very equitable in its treatment of the franchisee. We were told that the franchise agreement itself was drafted using an IGA franchise agreement and a Chrysler automobile dealership agreement as precedents.

13. Both Willett and Penmarkay exercise control over the duration of the arrangement. Upon certain occurrences Willett may take back its franchise from Penmarkay. Similarly Penmarkay may terminate the arrangement upon thirty days notice. The restrictions on Penmarkay are not out of the ordinary, they may be found in many, if not most, tied-supply contracts, licence arrangements, dealership contracts and distributorships. The dependence that Penmarkay has on Willett is no different from that where a parts manufacturer produces all its product for one automobile manufacturer, or that of a soft drink bottler on the supplier of its flavour extract (to mention only two examples).

14. The inferences and conclusions that my colleagues take from the documentation indicate a confusion between ordinary business practice and control over labour relations. This is not a situation where the documentation sets the franchisee up as little more than a store manager. Mr. Penrose and his key employees have complete control over how and how much the business will profit. They are obligated to buy product from Willett, but with the margins found in the grocery business, the market also constrains Willett to price the product so that the franchisee will be able to remain competitive with IGA, Dominion, Loblaws, Zehrs, Gordons, etc..

15. There is an interaction between Willett and Penrose that the majority are ignoring in their desire to maintain the status quo. For instance, my colleagues stress the fact that Mr. Penrose cannot sell his shares in Penmarkay, without the permission of Willett. That is just not so — Mr. Penrose can sell his shares whenever he wants. What he cannot do is transfer the franchise without Willett's consent. And it should come as no surprise that Willett wishes to exercise that sort of control over the franchise arrangement. Again, by way of example, it is no different from the control found in a licensing arrangement or a sales dealership.

16. Dominion, Willett and Penmarkay treated the franchise arrangement as a sale within the meaning of section 63 of the Act. It is unfortunate that my colleagues take this evidence of compliance by Dominion, Willett and Penmarkay with section 63 and use it as evidence contra those parties in order to form the basis for a declaration under section 1(4). If it wasn't for section 63, Dominion, Willett and Penmarkay would not have done what they did — how can such compliance then serve any purpose in determining the issue of common control?

17. Turning to the American scene, better minds than mine have considered these issues at the National Labor Relations Board, and have come to the opposite conclusion from the Board. It will come as some surprise to the labour relations community that the Board does not think our legislature had the "alter ego doctrine" in mind when it enacted section 1(4) of the Act. It will come as no surprise that the Board has ignored the American experience again, when it does not suit its purposes. As to what "a false dichotomy between control of labour relations and general economic control. The latter often entails the former. . . ." (paragraph 58 of the majority award), means, I leave it to the reader to work out this semantic puzzle.

18. To me, the business arrangements between Willet and Penmarkay do not constitute *de facto* control pursuant to section 1(4) of the Act.

IV

19. There is one other area that deserves comment. Facing massive financial losses Dominion decided to close a substantial number of stores. Deliberations began over whether Willett would begin the Mr. Grocer franchise concept to protect and expand its wholesaling base during tough economic times. After the first decision had been made, Dominion and Willett advised the union about it. No doubt at that time they were mindful of what the Board had to say in the *Westinghouse* case.

20. When Mr. Collins for the union first heard that stores would be closed and there was talk of franchising, his reaction was "don't franchise them as Dominion stores". The reply by Mr. Toma of Dominion was, "You've got it." Subsequently Dominion and Willett sought to open negotiations with the union about the franchises by presenting a draft collective agreement to the union. Mr. Collins reply was "one agreement, for all of the stores together and also covering all new stores." He flatly refused to submit a counter offer to Dominion and Willett.

21. The applicant union does not want to bargain individually with each franchisee. The union has nothing to lose by coming to the Board to obtain an order for all-inclusive bargaining. Counsel for the union was quite clear on this point — he argued that the status quo must be maintained during the life of a collective agreement unless the union agreed to changes. As I recall the reasoning in *Westinghouse* there was no contemplation that this Board would assist a union to obtain what it could not get in bargaining over a business closure. To the contrary, the board felt that labour relations policy would be best served by having the parties deal with

the issues. But the majority decision indicates an unbridled desire by the Board to maintain the status quo despite the union refusal to face the consequences of a financial disaster and bargain over the issues.

V

22. I would find that: a) There has been a sale of a part of a business from Dominion and Willett to Penmarkay; b) Given the previous case law of the Board, the application by Penmarkay pursuant to section 63(5) of the Act cannot succeed; and c) The applicant union fails in its application pursuant to sections 1(4) and 89 of the Act.

3061-83-U Health, Office & Professional Employees, Division of Local 206, Retail, Commercial and Industrial Union, Chartered by the United Food and Commercial Workers International Union, Applicant, v. **Preston Springs Gardens Retirement Home**, Respondent

Lock-Out — Employer experiencing severe operating losses — Making final and irrevocable decision to contract out all unit work — Decision not subject to grant of concessions by union — Not constituting lock-out

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members Gordon Donnelly and Bruce Lee.

APPEARANCES; *D. V. MacDonald, C. McCormick, and L. Parker for the applicant; Irv Kleiner, Charlotte Zigler and Rob Williamson for the respondent.*

DECISION OF R. O. MACDOWELL, ACTING ALTERNATE CHAIRMAN AND BOARD MEMBER GORDON DONNELLY; September 11, 1984

I

1. This is a complaint under section 93 of the *Labour Relations Act* alleging that the respondent employer has threatened, and subsequently implemented an unlawful lockout. The definition of the term “lockout” is found in section 1(1)(k) of the Act, which reads as follows:

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees.”

It is conceded that if the course of employer conduct described below constitutes a “lockout”

within the meaning of the Act, that “lockout” must necessarily be illegal, because it would have occurred during the currency of a subsisting collective agreement between the parties (see sections 42 and 72 of the Act).

2. The respondent employer, as its name suggests, runs a retirement home located in Cambridge, Ontario. The home has approximately 60 residents. In early 1982, the complainant union was certified to represent a bargaining unit comprising approximately 24 service employees working for the respondent. Following certification, the parties engaged in collective bargaining and eventually concluded a collective agreement. The agreement was executed on November 11th, 1982, and runs (partially retroactively) from June 1st, 1982 to January 30th, 1984.

3. There is no evidence concerning the course of bargaining between the parties, but it is apparent that the agreement to make retroactive wage payments resulted in some initial difficulty for the respondent. On December 3rd, 1982 the union executed a document permitting the respondent to pay the retroactivity in instalments, with the outstanding balance to be finally discharged on April 21st, 1983. In addition, on December 2nd, 1982, shortly after the agreement was signed, the parties executed the following additional “Letter of Understanding”:

The Union and the Employer will work and co-operate with each other in an endeavour to reduce the labour compensation costs in the Home. The parties agree that they will use their best efforts to bring the present labour compensation cost per patient day from its current level to a point where it would be competitive with per patient day costs of other Retirement Homes in the area. The parties agree that a reasonable target in this regard is a per patient day cost of \$12. and shall use their best efforts to attain that goal.

Any reduction in wage related costs are to be accomplished in accordance with the Collective Agreement between the Employer and the Union and it is the Union’s intention to co-operate fully in this matter.

The Letter of Understanding is a reflection of the financial problems faced by the employer at the time, and was the result of undertakings made by the union during the bargaining process. It was to be used to persuade the respondent’s bankers that serious efforts were being made to contain costs, so that those bankers would provide the funds necessary to pay the retroactivity.

4. The retirement home has been in financial difficulties for some time. It was purchased in 1981, and there are currently four mortgages on the premises. In the fiscal year ending March 31st, 1982, it had a net loss of approximately \$62,000. In fiscal 1983, the loss grew to \$185,000; and in the ten months, ending January 31st, 1984, there was a loss of approximately \$164,000. The projected loss for fiscal 1984 was in the neighbourhood of \$200,000.

5. In this industry, operating profit or loss “per patient day” is a common measurement of economic performance. For the respondent, the operating profit per patient day (i.e., excluding interest, depreciation and extraordinary expenses) declined from \$6.83 in 1982, to \$2.53 in 1983 and, finally, a mere 16 in the first ten months of fiscal 1984. During the same period, operating expenditures — and particularly escalating labour and benefit costs — were consuming an ever-increasing proportion of the total revenue, at a time when that revenue was already declining because some residents were seeking accommodation elsewhere. In fiscal

1982, labour costs absorbed 45% of total revenue; in fiscal 1983, it was 59%; and in the first ten months of fiscal 1984, it was 69%. Layoffs and reductions in working hours instituted in 1983 did not significantly alter the trend. In January, 1984, wage and benefit costs consumed 74% of incoming revenues and the employer calculated a loss for that month of over \$21,000. This represented an operating *loss* of \$5.70 per patient day which can be usefully compared with the operating profit of \$6.83 per patient day registered in fiscal 1982. The home had never been a profitable venture, but by early 1984, it was becoming a financial disaster.

6. In the Fall of 1983 the new owners of the respondent made efforts to sell the home back to its previous owners. The previous owners had a "soft spot" for the business, and good connections in the local community which could help to attract new residents. But the efforts were unsuccessful. The previous owners were unwilling to re-acquire what had clearly become a losing proposition.

7. These financial problems had been mentioned to the trade union representatives, but there had never been any thorough exploration of the employer's difficulties or any concerted collective effort to tackle the problem. In the spirit of the 1982 letter of understanding, the employer had merely reiterated its hope that the union could help contain the escalating costs. In a grievance meeting on February 16th, 1984, Robin Williamson, President of the respondent, asked the local union representative whether, in view of the employer's deteriorating financial position, it could expect any accommodation from the union and its members. He was told that there could be none, since negotiations were forthcoming and the employees in the bargaining unit expected a wage increase. When he was asked whether he would like to see a financial statement, the union representative declined.

8. At a later grievance meeting on February 23rd, 1984, the respondent again explained its financial problems, referring to the most recently available computer printouts. The trade union representatives were advised that the employer might find it necessary to subcontract the work of the employees in the bargaining unit. The employer had been considering that option since September, 1983 when the previous owners had decided not to re-purchase the facility.

9. Towards the end of February, 1984, the respondent decided that subcontracting the work of employees in the bargaining unit represented by the union was its only financial alternative; and, on February 27th, 1984, it sent the union the following letter:

Recently we have had discussions with Messrs. Hastings and Andress concerning the very serious financial circumstances in which Preston Springs Gardens Retirement Home finds itself. This, we are sure, comes as no surprise, as oftentimes during prior meetings, we have referred to the extreme month-by-month losses we are encountering.

One of the most definitive ways by which we, the Employer, can reduce the very serious financial obligations we are incurring in the operation of Preston Springs Gardens Retirement Home, is by contracting out of work in the bargaining unit. Accordingly, and pursuant to the provisions of Article 25 of the collective agreement between Preston Springs Gardens Retirement Home and Local 206, we are advising you that the Employer finds it necessary to contract out all the work performed by employees in the following categories in the employ of Preston Springs Gardens Retirement Home:

Guest Attendants
 Housekeeping
 Dietary
 Laundry
 Handyman/Maintenance
 Students
 Assistant Cooks

It is intended that the contracting out itself occur no later than April 15, 1984, however, a more definite date will be set in the very near future.

As a result of such contracting out, there will be a permanent layoff of employees in the above noted categories at Preston Springs Gardens Retirement Home.

In accordance with the provisions of Article 25 of the collective agreement, we would appreciate having the opportunity to meet with you within the period of the next thirty (30) days in order to consider any suggestions which you might have to minimize the adverse effects of the permanent lay-off which will take place as a result of such contracting out upon the employees so affected.

Please contact us immediately so that a meeting may be arranged to discuss the matter.

We will assume that you will inform the Union Stewards and Committee of our intentions. We would also request that you caution the Union Stewards and Committee not to discuss this matter with any of the Residents of Preston Springs Gardens. We will, in due course, inform the Residents as to our actions."

The categories mentioned, collectively, compromise the entire membership of bargaining unit. Article 25 of the collective agreement referred to in the letter, reads as follows:

"Where the employer finds it necessary to contract out work performed by the bargaining unit, and where such contracting out results in a lay-off of employees, the Home undertakes to meet with the Union no less than thirty (30) days in advance of such lay-off to consider what might be done to minimize the adverse effects upon the employees concerned."

Mr. Williamson testified that the purpose of this letter was to notify the union of the intended *permanent* lay-off of the employees in the bargaining unit, and to initiate discussions on the precise timing of that lay-off.

10. On March 13th, 1984, there was a meeting with trade union representatives as contemplated by the letter of February 27th, and Article 25 of the collective agreement. Charles McCormick, President of the complainant local union, was spokesman for the employees; and Robin Williamson was spokesman for the employer. At the meeting, the union was provided with a computer print-out of the employer's economic position which Williamson explained in detail. McCormick admitted that the wage costs were too high, but maintained that the union

was “not in the business of making concessions” — an alternative which, according to McCormick, had not been suggested by Williamson in any event. McCormick indicated that if the union’s accountants were provided with the employer’s audited financial statements, and verified the accuracy of the employer’s pessimistic projection, the union *might* consider recommending a wage freeze to its members. Again this was a suggestion from McCormick, not Williamson.

11. Mr. Williamson testified, and we accept, that the purpose of the February 27th letter, and the March 13 meeting, was not to induce any union concessions. It was a meeting held in accordance with article 25 of the agreement, to discuss ways of minimizing the effects of the planned layoff. Mr. McCormick’s evidence confirms this proposition. McCormick testified that the “the company didn’t ask for concessions and we didn’t agree to any”. McCormick told the Board that he was absolutely convinced that the company was determined to “bury the bargaining unit”. In McCormick’s opinion, there had been an irrevocable decision to sub-contract the work of the employees in the bargaining unit, and the employer had no intention of ever reversing that decision. In McCormick’s submission, the meeting of March 13th was something of a charade — even though the employer did indicate that there would be no real need to sub-contract if its existing labour costs were competitive with those available through the use of an outside sub-contractor. McCormick said the entire thrust of the meeting involved the union’s opposition to any sub-contracting at all, and the employer’s repeated assertions that this was precisely what it planned to do. McCormick was annoyed by the employers’s apparent rigidity.

12. A copy of the February 27th letter had been sent to the Minister of Labour and, on March 23rd, 1984, Williamson met with the Minister, the Deputy Minister and an Assistant Deputy Minister. As a result of that meeting, Harry Sparling, a Ministry official, was inserted into the process, with a view to seeking some accommodation. His precise role in the process is not clear. Sparling told Williamson that he would be in touch after he had talked to McCormick.

13. Sparling contacted Williamson a few days later, and told him that McCormick wanted a specific “proposal”. Williamson repeated what he had earlier told the union directly: the decision to sub-contract was made because of the projected savings and, if the union could match those cost savings, the sub-contracting would be unnecessary. Williamson testified that he advanced this proposal only because he had been requested to do so by both the union and the Ministry of Labour.

14. After discussing the matter with his colleagues, McCormick indicated that the union would be prepared to extend the agreement, with a wage freeze for one year, and to canvass the members about the employer’s purported “roll-back proposal”. Counsel for the employer, however, indicated that the employer was not there to negotiate. The union’s proposal was not a sufficient reason to revoke the employer’s decision, nor were there any other developments which, in the respondent’s view, warranted a rescission of its firm decision to sub-contract the work of the employees in the bargaining unit. It had taken its decision as a matter of pressing economic necessity, and it was not prepared to be drawn into a process of bargaining. It was too late for that.

15. A “lock-out” is a form of economic sanction undertaken by an employer to modify his employees’ behaviour. It is a bargaining posture with both subjective and objective elements. In the first place, there must be a withholding of work opportunities: “a closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees”. Secondly, (although often much more difficult to determine), there must be a subjective intention to compel or induce his employees (or some of them) to refrain from exercising rights or privileges which they enjoy under the *Labour Relations Act*, or to agree to changes in their terms and conditions of employment. Both elements must be present if the conduct in question is to be characterized, legally, as a “lock-out”.

16. The termination or lay-off of employees does not, in itself, constitute a lock-out even though the consequences for employees may be the same, nor is it sufficient that the employer was motivated by anti-union animus, if his intention was not to preserve the employment relationship of at least some of his employees on terms more favourable to himself. As the Board noted in *Doral Construction Limited* [1980] OLRB Rep. March 310, a mass termination of employees in favour of sub-contracting the work (there in response to a union organizing campaign) may be clearly illegal, yet still not constitute a “lock-out”. What is critical, is the *specific* motive behind the employer’s action, and, in particular, whether his intention is to preserve the relationship with his employees (or some of them) on different and more favourable terms. In the absence of such specific intent, the employer’s conduct is not a “lock-out” even though it may be an unfair labour practice or contrary to the terms of a collective agreement. That is why the Board has often held that a clear, final, unequivocal, and irrevocable decision to dispense with the services of some employees would not be a “lock-out” because the employer has no intention of preserving existing employment relationships on different terms or inducing employees to give up established rights. To reiterate: it may be an unfair labour practice, but it will not be an unlawful lock-out.

17. The determination of the employer’s intention, while critical in this legal context, can often be very difficult. In a volatile economic environment, occasions will inevitably arise when employers will be required to adjust their utilization of labour, alter hours of work, institute lay-offs, introduce job-destroying technological change, or even shut down part of their operation. Such decisions will necessarily have an adverse impact on employees, and will be of concern to their trade union; moreover, experience has shown that a candid discussion of these problems by labour and management can sometimes result in their resolution with attendant benefits to all concerned. Indeed, in *Consolidated Bathurst*, [1983] OLRB Rep. Sept. 1411, the Board suggested that responsible employers *should* seek to involve their employees’ bargaining agent in this often painful and difficult decision-making process. Certainly, from a public policy point of view, it would be a curious result if an employer who refused to discuss these matters with a trade union were immune from criticism, while an employer who engages in a full and frank discussion of his economic problems, his options, and the potential employee impact were to find himself guilty of a threatened “lock-out”. One would not lightly embrace an interpretation of a collective bargaining statute which so clearly encouraged unilateral decision-making and discouraged joint discussion of mutual problems. Should the “message” to employers be that they may face a lock-out allegation unless they act unilaterally, avoid consultation, adhere rigidly to their established course, and under no circumstances engage in discussion with the union which might be construed as “bargaining”? In *C. E. Lummus Canada Ltd.*, [1983] OLRB Rep. Oct. 1688, the Board observed:

11. The point raised is a difficult one. Given the definition of “lock-out”, an employer who speaks during the term of a collective agreement of

the need for concessions as a condition of further employment must be mindful of the basic structure of our *Labour Relations Act*. During the term of a collective agreement, an employer is not entitled to simply say, "I want a better deal, and I'm not going to continue to use your services, or part of your services, until I get it". That is prohibited as an untimely "lock-out", just as the opposite conduct on the part of employees and a trade union is prohibited as a "strike". On the other hand, an employer may, from time to time, find himself in a position where economic necessity has raised the spectre of management decisions which will significantly impact on the employment opportunities of his employees. In such circumstances it would seem to make labour relations sense to permit the employer to invite the bargaining agent to engage in meaningful discussion designed to avoid or minimize such impact, and indeed, this has been a main theme of the Board's "bargaining in bad faith" cases in recent times. Compare *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577; *Sunnycrest Nursing Home*, [1982] OLRB Rep. Feb. 261; and *Consolidated Bathurst*, [1983] OLRB Rep. Sept. 1411. The Board's interpretation of the law ought not simply to deny the employees, through their trade union, (or employee bargaining agency, as the case may be) this opportunity for input in every case where the problem comes to a head during the term of the collective agreement itself. But, as noted, a fundamental prohibition exists against "lock-outs" or threatened "lock-outs" during the term of the collective agreement, just as it does for "strikes", and the Board must be scrupulous in its analysis of each case, lest a plea of "economic circumstance" be used to mask an attempt simply to obtain better terms and conditions than have been agreed upon in the collective agreement. The Board recognizes that the issue of "economic necessity" can be a complex one, making a judgment on the employer's true motivation difficult; but the Board cannot shy away from making such judgments, if employees through their bargaining agent are to be permitted an opportunity to exercise some degree of control over their economic lives, on the one hand, and the identification and control of unfair labour practices, engaged in under a cloak of "economic necessity", is to be achieved on the other."

18. However, in our view, these questions of high principle or delicate balancing need not be debated here. The circumstances of the instant case provide a classic example of what is *not* a lock-out — whatever else it may be.

19. The evidence establishes, without doubt, that the employer's enterprise was awash in a sea of economic troubles, which threatened its continuing viability. Operating losses were escalating — in large measure because of rising labour costs which even the union conceded were substantially "out of line" with those of competitors. Equivalent services could be purchased in the market for much less, and the employer decided to take that opportunity. There is no doubt whatsoever that this decision was based solely upon economics and was intended to be final and irrevocable, nor we might add were there any of the classic indicia of anti-union animus which prompted the Board to draw the distinction between an unlawful lockout and other unfair labour practices. In any case, as Mr. McCormack saw it, the employer

was seeking to “bury the bargaining unit”. It was not seeking concessions. Its discussions with the union were solely in accordance with Article 25 of the collective agreement.

20. There was no intention on the part of the employer or expectation on the part of the union that modification of the terms established in the collective agreement could stave off the proposed lay-off. The only contrary suggestion came from an official of the Ministry of Labour who, upon the request of the union, requested a “proposal” from the employer which might result in some modification of its decision. Even then, the employer’s response was that it had made its decision on economic grounds and that if it could realize equivalent cost savings in other ways, there would be no reason to sub-contract the employees’ work. There was no “concession bargaining” on the employer’s part, and no intention to do so prior to the prompting of the Ministry of Labour official at the request of the trade union. In the circumstances the employer could not reasonably refuse to repeat what was obviously the case: so long as its labour costs were significantly above those payable to a sub-contractor, it was in its economic interest to sub-contract the work. We do not think that this interchange is sufficient ground for finding that there has been a threat of an unlawful lock-out; and, even if we were to find that the technical requirements for a “lock-out” have been met, we would be reluctant to grant relief for the allegedly culpable conduct on the employer’s part is merely an honest response to the union’s inquiry about what might be done to avoid the consequences of the course upon which the employer had embarked.

21. For the foregoing reasons, the Board finds that the respondent employer has not engaged in an unlawful lock-out. The complaint is therefore dismissed.

1275-84-R United Steelworkers of America, Applicant, v. Miwy Co. Ltd., Respondent, v. Group of Employees, Objectors

Constitutional Law — Respondent providing services to inter-provincial bus line at its Thunder Bay terminal — Handling baggage and parcels, servicing and cleaning buses and acting as ticket agent — Functions integral to federal operation — Not becoming provincial upon contract out

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. D. Bell and H. Kobryn.

APPEARANCES: *James K. McDonald, David Nicholson and Henry Gareau for the applicant; Robert W. Little and Tony Potesio for the respondent; Helen Milionis and Monica Martinez for the group of employees.*

DECISION OF THE BOARD; September 17, 1984

1. This is an application for certification.
2. At the commencement of the hearing in this matter, counsel for the respondent, Miwy Co. Ltd., raised as a preliminary issue the jurisdiction of this Board to deal with this application. The respondent takes the position that the employer and the employees affected by this application fall within the federal jurisdiction rather than within provincial jurisdiction.
3. The respondent operates a bus terminal located in Thunder Bay exclusively for Greyhound Lines of Canada Limited (hereinafter referred to as "Greyhound"). The terminal is on Greyhound's Toronto to Vancouver route and primarily services the Toronto to Vancouver buses, although Greyhound has one other local route operating out of Thunder Bay. There is no dispute in this case that Greyhound is engaged in inter-provincial transportation and it is agreed that Greyhound and its employees fall within federal jurisdiction. The evidence is that Greyhound has three classes of bus terminals: Class A, Class B and Class C. This terminal in Thunder Bay is classified as a Class B terminal. The Class A terminals are apparently those found in large cities and are fully staffed with employees of Greyhound. At the other extreme the Class C terminal involves no Greyhound employees at all. These are simply agency arrangements for ticket sales and parcel express. The Class B terminal provides the same functions as a Class A terminal, however, the functions have been contracted out. The Thunder Bay terminal is a Class B terminal. The only other Class B terminal in Ontario would appear to be the Greyhound terminal in Sault Ste. Marie.
4. The relationship between the respondent Miwy and Greyhound consists of a number of service contracts. The present terminal was opened in 1980. There is no evidence as to what Greyhound did for terminal services in Thunder Bay prior to that time other than to operate out of local restaurant. Some of the contracts are for terms of five years, one contract, the maintenance contract appears to be for an annual term. All of these contracts are, of course, renewable; however, they may be terminated upon failure of the respondent to perform according to the terms of the contract. The contracts specifically consist of a ticket, baggage and parcel contract, a maintenance contract and a recently negotiated local delivery parcel contract. The respondent Miwy also apparently leases the premises for a restaurant and operates a restaurant at the terminal. Greyhound owns the total bus terminal facility. The Greyhound employees at the terminal deal only with the drivers (dispatching and other such functions);

the rest of the terminal is operated by the respondent Miwy. The Greyhound employees do not supervise the Miwy employees. They can, however, request Miwy's compliance with the various service contracts. Miwy's contract is exclusively with Greyhound and requires the supplying of certain services exclusively to Greyhound. Indeed, any other carriers using the terminal must be approved by Greyhound. The evidence is that these tend to be what are called Tour Coaches and they are not an appreciable part of Miwy's business. Miwy's business is in fact totally related to Greyhound.

5. Looking at the Miwy operation in more detail, we find it can be broken down into several different functions. The first function is ticketing. The tickets are owned by Greyhound and Miwy acts as Greyhound's agent in this regard. Tickets are available to any destination in North America and this is the only place in Thunder Bay where tickets for Greyhound are available. This part of the operation requires the services of some five full-time employees and two part-time employees. Miwy is reimbursed for this on the basis of ten per cent of the value of the tickets sold. The second part of the operation involves baggage handling and parcel express. Apparently all of the passengers' baggage are handled by Miwy employees at the terminal. The parcel express operation involves handling incoming and outgoing parcels. These parcels are tariffed and the tariff collected by Miwy, and in this part of the operation Miwy employs five or six employees and is reimbursed on a basis of ten per cent of the tariff price on the parcels. Recently, a local delivery service was added by a contract with Greyhound. This, however, involves the part-time use of one of the parcel express employees. The third major function performed by Miwy deals with the maintenance of the buses. Every bus passing through the terminal is serviced by Miwy. The buses are washed, cleaned inside, and the toilet facilities are dumped and cleaned. Miwy also performs certain minor maintenance on the buses, such as replacing light bulbs and windshield wipers. It also re-fuels the buses and checks all of the various fluid requirements for the buses. This part of the service involves approximately five employees, and Miwy is paid for this according to a schedule of fees for services. As noted above, Miwy also is required to operate a restaurant and clean the facility. The evidence is that the restaurant operation amounts to about twenty-five per cent of Miwy's profit in terms of operating the bus terminal.

6. On the foregoing facts, the respondent argues that Miwy and its employees fall within the federal jurisdiction and are thus outside the jurisdiction of this Board. As previously noted, the applicant does not dispute that Greyhound falls within the federal jurisdiction in that its inter-provincial operation is regular and continuous. The respondent argues that Miwy's operation is an integral part of such a federal operation so as to remove Miwy from provincial jurisdiction. Further, the services provided by Miwy ought not to be characterized as a mere convenience which may be beneficial to the service provided by Greyhound, but not necessary to it. Rather, Miwy's services are integral to the Greyhound operation without which they couldn't function. In this regard, the respondent relies heavily on the decision in *Butler Aviation of Canada Limited* [1975] C.F. 590 (C.A.). In that case, the federal court of appeal found that the baggage handling, re-fueling and operating various facilities at an airport was an *integral part of the inter-provincial operations of the customers of the service at the airport*. The respondent argues that Miwy operates the same sort of service for Greyhound and is thus necessarily incidental to Greyhound's operation as an inter-provincial carrier.

7. Both the respondent and the applicant relied on the analysis of the constitutional division of power over labour relations by Chief Justice Jaccett in the *Canadian Air Line Employees' Association vs. Wardair Canada (1975) Ltd.* [1979] 2 F.C. 91 at p. 95:

“Generally speaking, labour laws, i.e., laws regulating the relations between an employer and his employees, fall within the legislative powers of the provincial legislatures. Where, however, legislative power in relation to a work, undertaking or business has been vested in Parliament, such power usually includes the authority to legislate with reference to the relations between the operator of the work, undertaking or business and the persons employed by him in the operation thereof.

Most of the decision cited relate to cases where the question was whether or not the work, undertaking or business on which the employees in question were employed was a work, undertaking or business in relation to which Parliament could make a labour law. Here the problem is different.

Where there is a work, undertaking or business in relation to which Parliament has legislative authority in the field of labour relations, a problem arises as to where the line is to be drawn between areas in respect of which Parliament can so legislate and other areas in respect of which labour legislation falls in the provincial domain. Certain of the cases where this type of problem arises, may be classified as follows:

- (a) where an essential component of operating a federal work, undertaking or business is carried on by a person other than the principal operator thereof under some business arrangement for co-ordinating their activities,
- (b) where an essential component of operating a federal work or undertaking is carried on at a location physically remote from the work or undertaking,
- (c) where fringe operations, reasonably incidental to a federal work, undertaking or business are carried on by the operator thereof as an integral part of the operation thereof, even though they are not essential to its operation,
- (d) where a person other than the operator of a federal work, undertaking or business carries on activities that are not essential to the operation thereof but could be carried on by the operator thereof as reasonably incidental to the operation of that work, undertaking or business.

These different classes of problem call for further comment.

With reference to Class (a), when the essentials of operating a work, undertaking or business within the federal field are carried on in part by one operator and in part by another, the employees of both fall within the federal legislation field. This can be deduced from the *Stevedoring Reference* to the Supreme Court of Canada.

The problem in Class (b) is like the problem in Class (a). Where part of the essentials of operating a federal work or undertaking are carried on at

a place physically remote from the work or undertaking, the employees at such a remote place nevertheless fall within the federal field. This is involved in what was decided by this Court last December in the *C.S.P. Foods* case *supra* page 23.

A more difficult problem arises in connection with Classes (c) and (d). A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation. Compare the decision of the Supreme Court of Canada in the *Construction Montcalm* case (1979) 25 N.R. 1, that was delivered last December.

To sum up with reference to Classes (c) and (d), as I understand the law, where something is done as an integral part of the operation of a federal work, undertaking or business and that something is *reasonably incidental* to such operation, it may be regulated by Parliament as part of the regulation of that work, undertaking or business even though it is not essential to the operation of such a work, undertaking or business; but where such a thing is made the subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament."

(emphasis added)

The position taken by the respondent was that the relationship between Miwy and Greyhound falls within the Class (a) referred to by Chief Justice Jackett, whereas the applicant takes the position that Miwy falls within Class (d). The applicant argues that Miwy's relationship to Greyhound cannot be essential, given the fact that the bus terminal was only opened in 1980. In our view, however, that does not go to the root of the matter. We have no evidence as to what Greyhound did prior to the opening of the present terminal in 1980, and indeed, the evidence we must look at is the present relationship between Miwy and Greyhound. While it may be, as the applicant argues, that the restaurant operation of Miwy is hardly an integral part of Greyhound's inter-provincial operation, it is clear on the evidence that the restaurant is not the major part of Miwy's operation. The major part of Miwy's operation is in our view an integral part of the inter-provincial bus service provided by Greyhound. Thus, we are not prepared to find that the ticketing and parcel handling and maintenance function performed by Miwy are other than essential services to an inter-provincial operation. Thus, although they

have been contracted out, they are still covered by the federal jurisdiction and do not become, by virtue of this contracting out, a local undertaking over which this Board has jurisdiction.

8. Counsel for the applicant also referred the Board to the *Airgo Agency Limited* case [1982] OLRB Rep. Sept. 1233 and other cases which deal with what might be called “express forwarding operations”. In our view, these cases are quite distinguishable from the present case in that the use of an inter-provincial carrier, is in those cases only incidental to the more basic operation of a freight forwarding company which is a local undertaking and thus regulated by provincial labour law. Here the evidence is clear that the relationship between Greyhound and Miwy is for Miwy to perform services for Greyhound and these are services which Greyhound must have performed in order to carry on its operation.

9. For the foregoing reasons, therefore, this application is dismissed.

0526-84-U United Food and Commercial Workers International Union, Complainant, v. Swiss Chalet Employers’ Association and its member, **Rahims Food Limited**, Respondent, v. Canadian Union of Restaurant & Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, and Canadian Union of Restaurant and Related Employees, Interveners

Evidence — Practice and Procedure — Manager testifying in unfair labour practice proceeding referring to information given by head office — Not hearsay but direct evidence as to motivation for manager’s conduct

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and L. C. Collins.

APPEARANCES: *Martin Levinson, Kevin Park and Stephanie Dick for the complainant; B. Pollock, F. Charron and J. Rahim for the respondent; J. Johnson, Tom Rees, and Paul Joanisse for the interveners.*

DECISION OF THE BOARD; September 12, 1984

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging, *inter alia*, that the grievor Stephanie Dick has had her hours reduced because of her activities in support of the complainant trade union.

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3. The respondent employer in the course of the hearing called as a witness its manager, Sam Rahims, the individual who made the decision to reduce Ms. Dick’s hours. Counsel asked Mr. Rahims in chief what caused him to make the change in question, and Mr. Rahims began to testify about certain information which had been brought to his attention by his head office. Counsel for the complainant at that point raised an objection that the testimony which the

Board was receiving was “hearsay”, and ought not to be accepted without an undertaking from the respondent to call as a witness the individual in head office who provided that information.

4. The ruling of the chair was that the objection was without foundation. The chairman noted that the issue before the Board was the motivation of the individual who made the decision to cut the grievor’s hours, and not the truth of the information upon which that individual is said to have acted. The evidence of what was said to Mr. Rahims, the decision-maker, and which he asserts prompted him to take the action that he did, is not, therefore, “hearsay”, but rather is direct evidence of motivation. The chairman noted that even if one were to assume that the evidence forthcoming was (in accordance with the pleadings) going to be that head office reported having received a complaint that the grievor had been working more than her proper share of part-time hours, the Board’s concern would be not with the truth or accuracy of that report, or even of the complaint, but only with whether such a report was made to Mr. Rahims, and, more particularly, whether it was in fact that report which caused him to act. In this regard, the chairman noted the difference between complaints before it of anti-union animus under the *Labour Relations Act*, and issues of “just cause” arising, for example, in disciplinary grievances before a board of arbitration. The Board accordingly ruled that the evidence being objected to was direct, probative, and properly admissible, the only question ultimately for decision being whether the Board believes that the reason given by Mr. Rahims was in fact the basis, and the *only* basis, upon which Mr. Rahims was motivated to act. And on this latter point, the Board noted the effect that failure to confirm the report (or complaint) prior to acting, or the failure to call someone readily available to corroborate the fact that the report (or complaint) was made, might have on the *weight* the Board might attribute to the witness’s evidence of motivation, in deciding whether or not that evidence is worthy of belief.

5. Counsel for the complainant has requested the Board to reduce its oral ruling in this regard to writing so that counsel may have the opportunity to study it, and the Board, in light of the issues which remain to be litigated in this matter, has considered it appropriate to do so.

0984-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC., Applicant, v. **Simpsons Limited**, Respondent, Group of Employees, Objectors

Bargaining Unit — Certification — Charges Constitutional Law — Practice and Procedure — Whether salesmen paid solely by commission having distinct community of interest — Board not undertaking investigation into allegations of unlawful organizing tactics by union — Whether requirement to join or pay dues to union contrary to Charter — Whether information on objecting to certification contained in Form 6 inadequate

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members, W. H. Wightman and B. L. Armstrong.

APPEARANCES: *Gordon D. Reeckie and Doug Roache for the applicant; T. F. Storie and R. E. Brown for the respondent; Arnold Adams and Paul McKendrie for the employee objectors.*

DECISION OF R.O. MACDOWELL, ACTING ALTERNATE CHAIRMAN AND BOARD MEMBER B.L. ARMSTRONG; September 11, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. When this matter came on for a hearing before the Board on August 3rd, 1984, the union and employer were able to reach agreement on the description and composition of two bargaining units which, in their view, were appropriate for collective bargaining. That agreement was reached in light of previous certification applications before the Board in this industry, and involving these parties at other store locations. The bargaining unit descriptions agreed to and proposed by the union and the employer are as follows:

FULL-TIME UNIT

“All employees of the respondent at its retail store(s) in the Township of Kingston, in the County of Frontenac, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during school vacation period, students employed on a co-operative program with a school, college or university, and employees of H. B. C. Travel Limited and all employees of The Haircutting Place.”

PART-TIME UNIT

All employees of the respondent at its retail stores in the Township of Kingston in the County of Frontenac regularly employed for not more than twenty-hours (24) hours per week save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, students employed during the school

vacation period, students employed in a co-operative program with a school, college or university, and all employees of H. B. C. Travel Limited and all employees of The Haircutting Place.

The applicant union and the respondent employer were further agreed that, for the purposes of clarity, the following management positions above the rank of department head should be specifically excluded: store manager, sales manager, personnel and office manager, security manager, restaurant manager, visual presentation co-ordinator, advertising co-ordinator, supervisor: Elizabeth Arden Salon, manager: travel service; manager: The Haircutting Place.

4. Mr. Arnold Adams appeared on behalf of five of the ten "commission salesmen" who work for the respondent and who would be included in the above-described full-time bargaining unit, if the Board were disposed to accept the descriptions submitted by the union and the employer. Mr. Adams is one of ten such commission salesmen, all of whom are paid *solely* on the basis of earned commissions, unlike other employees who are paid on an hourly basis or on the basis of a wage or salary plus commission. Mr. Adams told the Board that he does not wish to be represented by a trade union and does not see what benefit a trade union would be for persons in his position. He asserts that fully commissioned salesmen have a separate community of interest from the other employees working for the respondent. He concedes that, as far as he knows, his duties or position are no different from other commission salesmen at other locations who have regularly been included in the bargaining units which the applicant union has been certified to represent. It is also acknowledged that in a number of cases involving the T. Eaton Company Limited, commission salesmen have been included in the bargaining unit. In other words, the unit description agreed to by the union and employer has been generally found to be "appropriate" in this industry and for other similar store locations operated by this employer.

5. The position of commission salesmen was recently considered by the Board in a certification case involving the applicant union and the T. Eaton Company Limited store in Scarborough (See, *T. Eaton Company Limited*, [1984] OLRB Rep. May 755). In that case, the salesmen were not only 100% on commission, but were also involved in the sale of sophisticated computer equipment, requiring specialized training and skills, which gave their department characteristics which were a little different from some of the other store departments. Likewise, the skills, duties, progression path, and mobility were somewhat different from those of other salesmen. However, the Board was not persuaded that this small group of employees should be excluded from the bargaining unit, thereby potentially fragmenting the bargaining structure — with all of the labour relations problems fragmentation involves. The Board observed:

While the question before us in the present application is whether to accede to the request of the employer to allow this one small group to remain outside the broad-based sales unit, viewing the matter from the point of view of its corollary better illustrates the problem. If the five-men sales unit of the business centre is appropriate for exclusion from the broader sales unit now before us, it presumably would also be appropriate as a self-contained bargaining unit at another store, where *no* other union organizing may yet have taken place. That is not the kind of piecemeal organizing or collective bargaining which the Board would be anxious to foster in this industry. While the needs of the [business] centre may require certain accommodations, we are not persuaded on the facts that those accommodations cannot

be made within the broader context of the varyingly specialized and commissioned/non-commissioned sales unit.

In *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, the Board also had occasion to comment on the industrial relations consequences of a multiplication of bargaining units within a single enterprise:

50. We may begin by observing that the notion of an “appropriate” bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes “labour relations sense” to lump together for the purposes of collective bargaining, and section 6(1) of the Act leaves the Board’s discretion to fashion bargaining units largely unfettered. Yet the Board’s determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope of the effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a

single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest — if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

6. We are of the view that those comments are equally applicable here. The question before us is not whether Mr. Adams and the several employees he represents do or do not want to be represented by a trade union. The issue is what bargaining structure makes sense, and is most likely to further orderly collective bargaining. In this context, and in the absence of compelling evidence that these salesmen have a substantially different community of interest from other salesmen employed by the respondent, we are reluctant to adopt a view which fosters undue fragmentation of the bargaining structure. Employees in Mr. Adams' position have routinely been included in other Simpson's units at other locations, and in retail sales bargaining units for other employers without any apparent collective bargaining difficulties, and we do not think this established pattern can be ignored. We see no basis on the evidence before us for departing from it. Mr. Adams' submission that he does not wish to be represented by the union does not, in itself, constitute a sufficient ground for defining a bargaining unit in terms which exclude him and the several employees upon whose behalf he appears. Nor, in our view, should any special significance be attributed to the fact that he is paid totally "on commission" — although that fact might have to be considered by the union and employer when they actually sit down to bargain.

7. Mr. Adams further submits that he should not be required to join a trade union or pay the dues or assessments levied by a union to support its activities as the employees' bargaining agent (collective bargaining, representation of employees in grievance-arbitration matters, etc.). He argues that the *Canadian Charter of Rights* protects "freedom of association", so that it must necessarily also protect an individual's right *not* to associate, and to refuse to support the objects of an association with which Mr. Adams does not agree. Mr. Adams advances this proposition as an additional reason for excluding him from the bargaining unit and for relieving him of any obligation which he may subsequently have to contribute financial support to the activities of the union in its role as bargaining agent for the respondent's employees.

8. Mr. Adams' submission, whatever its philosophical merits, raises fundamental questions about the existing legislative framework for collective bargaining at both the federal and provincial levels. That system permits a trade union with the support of a majority of employees to become the exclusive bargaining agent for a defined group which a Labour Relations Board determines to be appropriate for collective bargaining. In this and other Canadian jurisdictions, employees do not have an unfettered right to apt out, choosing another union as their representative or no union at all. They are bound by the will of the majority of employees in the bargaining unit that this Board determines to be appropriate. Legislation in Canada has not followed the English pattern of total "voluntarism" which, until recently, permitted the growth of collective bargaining, without any legislative control. Total voluntarism was apt to produce a "crazy quilt" of bargaining structures, with the undesirable labour relations consequences that we have already mentioned. Indeed, in sectors where bargaining patterns often predated legislative regulation (the railways or construction industry for example) there has been a determined effort to consolidate bargaining structures. We do not think the *Charter of Rights* was intended to or does impinge upon these legislative efforts to foster orderly collective bargaining and industrial peace.

9. Likewise, legislation has not prohibited dues checkoff or compulsory membership requirements which were prevalent prior to the passage of any collective bargaining legislation at all. The vast majority of collective agreements contain such union security devices, and it is difficult to accept that Parliament intended that henceforth they should all be illegal. What the Ontario statute has done, is to attempt to strike a balance: recognizing the legitimacy of union security devices, but restricting their operation where there is abuse or potential collision with other important societal interests. For example, the Act provides for the exemption of employees who have a bona fide religious objection to supporting a union, and protects employees whose jobs might be put in jeopardy because they have been denied or expelled from union membership for (*inter alia*) taking a stand against the union, or refusing to pay unreasonable dues (see section 46). Clearly, the current legislative scheme in this, and other provinces, represents a sophisticated and calculated balancing of competing individual and collective interests in a collective bargaining framework which necessarily requires some sensible compromise between collective and individual concerns.

10. Mr. Adams' submissions raise important philosophical and legal issues concerning the impact of the *Charter of Rights* on the established collective bargaining legislation in this and other Canadian jurisdictions as well as the propriety of a variety of arrangements negotiated by the parties and included in their collective agreements. But, however important the issues raised by Mr. Adams may be, we do not think it is necessary to deal with them at this time. In the first place, we do not think that the notion that collective bargaining should take place in respect of units which are "appropriate" impinges upon any fundamental interest protected by the *Charter of Rights*. Secondly, Mr. Adams is not now required to be a union member nor to pay union dues. That situation will arise if, and only if, the union is certified and it eventually concludes an agreement with the employer requiring membership and/or payment of union dues. Finally, and most importantly, we do not think we should canvass legal propositions which could significantly alter the legal framework for collective bargaining in this and other provinces without thorough and careful legal representations on this question. While we do not wish to diminish Mr. Adams' concerns, we do not think we should conclude that portions of our constituent statute are void or that the Board should significantly alter its approach to bargaining unit determination solely because an individual is opposed to supporting a union and makes rhetorical reference to the *Charter of Rights*. Whether Mr. Adams and those employees he represents would have a *Charter of Rights* argument at some time in the future and perhaps in another forum, we need not here consider.

11. We turn now to the purported "charges" against the trade union and the effect which such allegations should have on the conduct of this proceeding; however, to put this matter in context, it may be useful to advert, briefly, to the degree of union membership support which, it is said, should be cast in doubt by these "charges".

12. In support of its application for certification, the trade union has filed documentary evidence on behalf of well over 55% of the employees of the respondent in each of the above-noted bargaining units. This documentary evidence takes the form of membership cards, which include a combination application for membership, and an attached receipt. These cards are each signed by the subject employee, and the receipts are counter-signed by a witness (the "collector") and indicate that a payment of at least \$1.00 has been made to the union in respect of its membership fees. The documentary evidence is supported by a properly completed Form 9, statutory declaration, attesting to its regularity and sufficiency. There is no suggestion of any irregularity in the form of this documentary evidence nor, save for the matters we will refer to below, is there any alleged impropriety in the manner in which it was solicited. It has

all of the attributes of a valid and voluntary “contract”. The form and contents of the documentary evidence of membership are consistent with the requirements of section 1(1)(1) of the Act and, as well, it meets the form and time limit requirements prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of “membership support” well in excess of that required by section 7(2) of the Act, for certification without recourse to a representation vote. On the basis of this documentary evidence it is evident, and the Board finds, that more than 55% of the employees, in each bargaining units mentioned above, were members of the union on July 23, 1984, the terminal date fixed for this application and the date which the Board determines under section 103 of the Act to be the time for ascertaining membership under section 7.

13. There was also filed with the Board various “statements of desire” or “petitions” signed by some employees of the respondent indicating that they wish to oppose the certification of the applicant union. In several cases these documents were signed by individuals who had previously signed union membership cards and paid \$1.00 in respect of union membership fees and, therefore, were “members” of the union within the meaning of section 1(1)(1) of the Act. These individuals had had a purported change of heart, and now allegedly no longer wish to support the applicant union’s certification. It is clear, however, that the vast majority of these employee objectors had either never supported the union at all and had not signed membership cards or, were not, by reason of their duties and responsibilities or place within the respondent’s management structure, excluded from the bargaining unit. In the result, even if all of these individuals can be considered (colloquially) as casting a “no” vote for trade union representation, their collective expression does not diminish the unequivocal membership support enjoyed by the union among well over 55% of the employees in the bargaining unit. A consideration of the “numbers” would not, in itself, warrant any departure from the Board’s usual practice, mandated by the statute, of certifying an applicant union, where it is able to demonstrate membership support among more than 55% of employees in a bargaining unit.

14. We turn then to the purported “charges” of impropriety. In considering them, we will attempt to accommodate the spirit of section 111 of the Act, and preserve the secrecy of employee opposition to the union even though, in this case, some of the persons expressing opposition to the union are not “employees” within the meaning of the Act because they exercise managerial functions (see section 1(3)(b)). Nevertheless, it may be helpful to sketch in the total picture, and rather than referring to employee names (which are not strictly necessary) we will refer to numbers assigned for identification purposes to the objectors who filed complaints against the union. In this way, we can convey a “flavour” of the “charges” against the union, without exposing the individual objectors to either personal embarrassment, or revealing their position respecting trade union representation — an employee preference which section 111 of the Act suggests should be kept secret as far as possible. These expressions of employee views are contained in the letters or petitions addressed to the Board, and are, of course, hearsay to the extent that the writers did not appear and their representative had no direct knowledge of the matters mentioned.

15. P1-P5 are the five commission salesmen, represented by Mr. Arnold, who oppose the union’s certification because they do not think they share a community of interest with the members of the bargaining unit and see little benefit in trade union representation. P6 (a person excluded from the bargaining unit on the basis of that she exercises managerial functions) was disturbed that department supervisors like herself who, under the Act, were not entitled to engage in trade union activity and collective bargaining, were not allowed to attend union meetings or discuss the union with subordinates. She was also concerned that in the wake of

the announced layoff of 27 employees, a fellow employee and union supporter had claimed that the company was “making money”, without providing any statistical foundation for that claim — a statement P6 considered misleading. P7 and P18-P31 (which includes both some supervisory and clerical personnel excluded from the unit) express opposition without citing any reason. P11-P17 express concern about the union’s international links and support for the New Democratic Party, and repeat the assertion that as members of management their views on the union have not been sufficient canvassed. P9, a clerical employee excluded from the bargaining unit suggests that the union is not in her best interests. P8, another clerical employee excluded from the bargaining unit, complains that a union supporter was pressing, persistent and rude. P10 complains that in her view union supporters have attempted to “coerce” people, in that she saw at least two employees approached a number of times. On one occasion one of these employees was told, profanely, that she had to “get off her [expletive deleted] ass” and “stand up for her rights” since support for the union was her only hope for reinstatement [she was scheduled for layoff]. Except in the case of P8 (who, we repeat, was not in the bargaining unit and did not sign a union card) the persons involved in these discussions are not generally identified.

16. It will be seen from the foregoing that the purported charges against the union are, at best, a little “thin” — leaving aside the fact that most of the above submissions are made by persons who are excluded from the bargaining unit on the basis of their status as members of the management team, and others are made by persons who are excluded from the bargaining unit on other grounds or may never have been union supporters in the first place. Even if all of these assertions are treated as being true (and there is, of course, no evidence of that), they must be weighed against the reality of a union organizing campaign which, in some respects, resembles a political campaign in which one party seeks to boost its own position and attack that of its political adversaries. In these days when we are all being subjected to such propaganda when pressing and persistent entreaties are common, and when the contending parties are all making assertions which must be taken with a healthy grain of salt, it is difficult to give much weight to the concerns expressed by the objecting employees. No doubt, some of them found the union’s campaign objectionable in one way or another, but this is a far cry from intimidation or coercion in the sense contemplated by section 70 of the *Labour Relations Act*. Even if one assumed that all of the assertions in the letters addressed to the Board were true, it would not, in all likelihood, affect the result in this case. The fact is, that the overwhelming majority of the employees of the respondent, in each of the bargaining units defined above, want a trade union to represent them. Whether that decision is wise or foolish is not for us to decide.

17. We should note that the objecting employees mentioned above designated a representative to appear on their behalf. He did so. He had no personal knowledge of the concerns referred to in the employees’ letters. He had no evidence or witnesses to call to confirm the accuracy of those employee assertions. He had no direct knowledge of any of the events referred to and, could not, of course, make any comment upon what an individual employee writer said he/she had observed. In the case of P10 who claimed that X and Y, two employees designated for layoff, had been approached frequently and told, too forcefully, to “stand up for their rights”, there was nothing whatsoever to substantiate this hearsay statement.

18. The union contends that it should not have to defend against these belated, amorphous, and unparticularized complaints, which surfaced only *after* it was revealed that the union would be entitled to certification in both bargaining units. The employer asserts that these charges are serious and that, on its own initiative, the Board should investigate them. The employer notes that it is under some disability in this regard because if it were to probe who was or was

not a union supporter, it might be charged with interfering with employee rights under the Act. The employer also argues that the Form 6 Notice to Employees does not give sufficient information to employees potentially opposed to the union to register their dissent.

19. We do not agree. The Board is a quasi-judicial body constituted to adjudicate disputes between contending parties under the *Labour Relations Act*. The Board does not institute an investigation of the merits of a complaint simply because someone sends a letter to the Board containing allegations which *might, if true*, be a relevant to a Board proceeding. Parties potentially affected by the result of such proceeding are given notice and are entitled to participate. If charges are appropriate, they are entitled to make them. But it lies upon the party alleging misconduct to bring forward the evidence to prove it. That is not the Board's role.

20. In the instant case, the employer made the submission that it was particularly concerned about the allegation of alleged misconduct characterized as "coercion" and referred to above. The employer also indicated that, not having made the charges, it was not in a position to call evidence to substantiate the events referred to. Nor was the representative of the concerned employees. However, it was clear that some of the allegations, whether improper or not, involved a union supporter whom the employer, on the basis of information received, believed to be involved. The employer was aware of the individual's identity and she was present in the hearing room on the day of the hearing. The Board ruled (over the union's objection) that, while its role did not encompass an independent investigation of alleged misconduct, it would entertain any evidence which any of the parties wished to lead with respect to that matter. The objecting employees had no such evidence; but it was open to the employer to call, as its witness, the purported union organizer whom it believed was the "culprit". The employer declined to do so. Counsel indicated that he was not prepared to call the individual as his witness, thereby foregoing the advantages of cross-examination. Thus, there is no direct evidence at all of the conduct which is said to constitute impropriety. The objecting employees called no such evidence and, when invited to do so, the employer made the same choice.

21. The employer's final plea concerns the adequacy of notice to employees and the content of Form 6 — the Notice to Employees of the application and their right to register an objection.

22. Form 6 is prescribed by regulation. It indicates, fairly clearly, how employees can register their objection to the union's certification. In the instant case, a number of employees did so, and it seems they were not acting together. There is no evidence before us to suggest that any employees were misled by the "legal jargon" contained on Form 6. Quite the contrary, there were a number of timely employee objections and two individuals, appeared separately, on behalf of different groups of employees objecting, who for different reasons, were opposed to the union's certification. If the employer's submission is that the ordinary employee is incapable of understanding his right to oppose the union, the circumstances here do not support that proposition.

23. If the employer's submission is that employment law is complicated and not always readily understandable by individual employees, we unhesitantly agree. A certification application, a claim for workers' compensation, a claim under the *Employment Standards Act*, or a claim for unemployment insurance benefits, may all involve statutory or regulatory language with which an individual employee will not be familiar. He may even require legal advice if he is to successfully make his way through the statutory framework. Complexity is an unfortu-

nate by-product of modern economic life and access to informed legal advice may not be as easy as it should be. But the Board, as a quasi-judicial entity, can only do so much. It can provide, as it does, a Guide to the Act which, in fairly clear terms, sets out the options open to the objecting employee in a fairly straightforward certification application. There are pamphlets to the same effect available on request from local offices of the Ministry of Labour.

24. What the Guide indicates, as it must, is that what is at issue in a proceeding before the Board are *legal* rights. In the circumstances, persons involved in proceedings before the Board are advised to seek the assistance of a lawyer or someone experienced in labour relations matters. Such assistance, we might note, may not only be useful to employees objecting to the formation of a trade union, but also to persons who want to join or form a trade union and who must, therefore, do so in accordance with the statute. Proponents and opponents of collective bargaining can sometimes face the same problems of determining the appropriate method of achieving their objective within the framework of the *Labour Relations Act*. No doubt in family law questions or matters of taxation, individuals may be equally perplexed. But that is no reason for this Board to ignore its responsibility or its own statutory mandate where, as here, a clear majority of the respondent's employees have indicated a desire for collective bargaining.

25. For these reasons, a certificate will issue in respect of the two bargaining units defined in paragraph 3 above.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. Dealing first with the penultimate paragraph of the majority decision, I did not hear Mr. Adams say anything to suggest he is an "opponent of collective bargaining". Clearly he viewed compulsory unionism as having coercive aspects with which he strongly disagrees and he could perceive no value for him, or the other commission salesmen he represented, in being represented through a labour union. He said nothing to indicate he would deny the right to be collectively represented to workers in general or to his co-workers in particular. Thus to characterize Mr. Adams as an opponent of collective bargaining is both unfair and unproven.

2. The concern of the Board over the implications of fragmentation, as expressed in paragraph 5 of the majority award, are views with which I agree. However, with respect, I do not feel the fact that the Board has previously found persons totally on commission appropriate for inclusion in collective bargaining units to be a compelling reason for continuing to do so.

3. As the majority to this decision has indicated it is not for this Board to instruct the courts as to the implications of the freedom of association provision of the *Canadian Charter of Rights*. However, pending more definite indications as to the meaning of the Charter's provision, I do not think the majority decision meets Mr. Adams' contention that the now enshrined right to associate must carry with it an equal and concurrently implicit right *not* to associate. I do not think it sufficient to tell Mr. Adams that he is not now required to be a union member nor to pay dues and that "that situation will arise if, and only if, the union is certified and it eventually concludes an agreement with the employer requiring membership and/or payment of union dues" at paragraph 10 of the decision, and then proceed to grant certification at paragraph 25 of the same decision. Indeed, since the statute also provides for automatic dues deductions in collective agreements, paragraph 10 strikes me as being more cynical than responsive.

4. In dismissing the charges against the union, the majority draws an analogy between the union organizing campaign and the current national election campaign. For all its imperfections the secret ballot vote is apparently seen by the majority in the same light as the defeated Prime Minister who observed that the voters are always right, notwithstanding "propaganda", "pressing and persistent entreaties", and "assertions which must be taken with a grain of salt".

5. I would have thought that employees of Simpsons Limited are as reliable as the rest of the Canadian electorate and that Mr. Adams, and everyone else, would have been more content had the Board allowed the certification decision to be made by means of a government-supervised secret ballot and I would have so ordered.

0586-84-R Canadian Union of Operating Engineers and General Workers, Applicant, v. The Sisters of St. Joseph of the Diocese of London in Ontario operating **St. Joseph's Hospital at Sarnia, Ontario**, Respondent

Certification — Practice and Procedure — Three unsuccessful certification applications within period of six months — 4 months bar imposed on withdrawal of fourth application

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members F.W. Murray and B.L. Armstrong.

DECISION OF THE BOARD; September 27, 1984

1. This is an application for certification in which a pre-hearing representation vote was requested. Application was made May 30, 1984, and in the normal course a Labour Relations Officer was appointed the same day to confer with the parties regarding the bargaining unit description and employee lists. A meeting pursuant to such appointment was arranged for June 13, 1984. On June 12, 1984 the Board received a telex from the applicant requesting leave to withdraw the application. The respondent objects to this withdrawal and requests a dismissal with the imposition of a 10-month bar to any future application for certification with respect to the same or similar unit. The bargaining unit applied for is:

All lay employees of St. Joseph's Hospital Sarnia save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-, occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photograph technicians and artists — medical illustrators, registered, non-registered and student: laboratory technicians, X-Ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians, and laboratory assistants) supervisors, persons above the rank of

supervisor, foreman, persons above the rank of foreman, chief engineer, those covered by subsisting collective agreements, office and clerical staff, (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

2. This application is the fourth by the applicant in connection with some or all of this group of employees. The first (Board File No. 0448-83-R) was an application made in May of 1983 to represent 9 employees whose classifications were carpenter, painter, maintenance helper, electrician, maintenance mechanic, maintenance co-ordinator. The Board determined that this was not a bargaining unit appropriate for collective bargaining because it was not the broad service type of unit (the same as described above in paragraph 1) which the Board had in numerous prior decisions found to be appropriate in the hospital context. At the time of the first application, there were approximately 120 employees in the broader unit. Since the applicant did not have sufficient membership evidence for the broader unit, the Board dismissed the application after a hearing.

3. The second application (Board File No. 1855-83-R) made on November 14, 1983 was for representation rights for all employees in the appropriate bargaining unit. In that application the applicant requested a pre-hearing representation vote and the parties met with a Labour Relations Officer in the normal course. At that meeting the applicant withdrew its application because it had not filed sufficient membership evidence to meet the minimum requirements for a pre-hearing vote. The respondent objected to the withdrawal and requested the Board to dismiss with a 6-month bar pursuant to its powers under section 103(2)(i) of the Act. The Board allowed the application to be withdrawn notwithstanding section 5 of Practice Note No. 7.

4. The third application (Board File No. 2988-83-R) reported [1984] OLRB Rep. Apr. 651, was filed in March of 1984, again for the appropriate bargaining unit, and again requesting a pre-hearing vote. The parties again met with a Labour Relations Officer. Again, after the applicant assessed its membership evidence and it fell short of the thirty-five per cent necessary for a pre-hearing vote, the applicant requested leave to withdraw. On this occasion as well the respondent pressed for a dismissal with a bar this time of 12 months. The Board considered this request and, while dismissing the application, refused to impose a bar for the following reasons:

1. This is an application for certification in which the applicant seeks leave of the Board to withdraw the application. The respondent, citing two previous unsuccessful applications, asks the Board to dismiss the application and impose a bar upon the filing of a subsequent application for a period of one year. The applicant, in support of its position that a bar not be imposed, points out that the first unsuccessful application was in respect of a nine (9) man maintenance unit that the Board found not to be appropriate for purposes of collective bargaining. The instant application, and the one immediately before it, are in respect of all support employees. The Form 9 filed by the union and the lists of employees filed by the respondent indicated that there are approximately 160 employees in this bargaining unit.

2. In the *Patchoque Plymouth Hawkesbury Mills* case [1972] OLRB Rep. July 747 the Board briefly set out in paragraph 7 those types of situations which have led the Board to exercise its discretion under section 103(2)(j) and impose a bar for a specific period of time on subsequent certification applications. The third type of situation referred to in the *Patchoque* case *supra*, is analogous to the case at hand and pertains to those instances where the Board is asked to exercise its discretion following the dismissal of a series of applications over a short period of time which cover essentially the same employees. In this regard the *Patchoque* case *supra* refers to the *J. W. Crooks Company* case [1972] OLRB Rep. Feb. 126 wherein the Board imposed a six month bar following the dismissal of an application which was the fourth unsuccessful application brought within a period of little more than three months. In the *Ken Bunyak's Bus Lines* case, Board File No. 5714-74-R, the Board found that a second unsuccessful application within a short period of time did *not* warrant the imposition of a bar to a third application. Although each case must be decided on its particular merits, these cases establish parameters which in the absence of special circumstances are persuasive.
3. The first application, as we have noted, was in respect of nine maintenance employees. Although these nine employees fall within the much larger all-employee unit (approximately 160 employees) for which the union has sought bargaining rights in this and the previous application, it can hardly be said that the first application pertains to the same employee group as would cause the degree of unrest and uncertainty necessary to support the imposition of a bar to a subsequent application.

5. The Board invited submissions from the applicant and the respondent in the current application for certification regarding whether there should be an imposition of a bar. The respondent submitted that the employer had been put to considerable inconvenience in having to deal with four applications for certification over a period of one year. These applications had been dealt with on a priority basis, as is necessary, and time (for overtime and weekend hours) was spent computing the hours of employees to determine whether or not they fell into the full-time category. The respondent feels it has experienced enough inconvenience and ought to be spared this for 10 months from May 30, 1984.

6. The applicant submitted that in its application in Board File No. 1855-83-R it withdrew the application because the lists prepared by the employer contained 174 names and the applicant only represented 33% of them. In the application in Board File No. 2988-83-R the applicant withdrew because out of the 174 names on the employer list, which list the union claims (but does not elaborate thereon) was substantially different from the previous list, the applicant still had less than the required 35% support. Finally, in the current application the applicant noticed in the employer's reply that it was claiming 194 employees in the unit and the applicant, knowing it did not have support of 35% of this number, withdrew prior to the meeting with the Labour Relations Officer, and prior to examining the lists. The respondent considers the latest withdrawal as evidence that the applicant had no more cards than it had in the previous application in March or, alternatively, as poor organizing on the union's part not to provide for fluctuations on the list. The respondent also points out that the shortfall of

cards on a pre-hearing application is materially different from a shortfall of cards on an application pursuant to section 7.

7. The Board considers that we are considering in this case the imposition of a bar following three unsuccessful applications over a period of six months. The first application could not reasonably be considered disruptive or causing unrest or undue hardship on the respondent. The lists prepared were dealing with only 9 employees and the lack of success in the first application is attributable to the Board's assessment of the appropriateness of that unit.

8. The second application was made on the basis of the applicant's perception that it had more than 35% of the unit. Logically, when this perception was found to be in error, the applicant attempted to withdraw. Considering the stage at which the withdrawal occurred in light of Practice Note No. 7, the application should have been dismissed.

9. The third and fourth applications must be evaluated against the fact that the applicant would have had clearer perceptions about the likely size of the unit after the second application. The third application took place more than 4 months later than the second application. That length of time alone would have raised the prospect that the number in this type of a bargaining unit could change significantly and, therefore, the applicant took certain risks in waiting this long to reapply. Those risks may have been necessary in order to attempt to sign up more employees. In the third application it is clear that the unit had not, in absolute numbers, changed at all but the applicant remained deficient in membership support necessary to sustain the pre-hearing application notwithstanding having signed up more members because of an increase in lost cards. No bar was imposed for the reasons cited above. In this fourth application made two months after the previous application, it appears that over that period there had been an increase in the bargaining unit size (to approximately 194) and this contributed to a greater or lesser extent to the decision to withdraw, again notwithstanding filing additional membership from the previous application.

10. We consider that at this point it is necessary to exercise our discretion and impose a bar of 4 months from May 30, 1984. We have exercised our discretion on the basis that this is the third application for certification within a space of six months. On each of these applications the matter had progressed to the point where the respondent had prepared the necessary schedules containing the names of employees and a Labour Relations Officer's meeting had been convened or was to occur the day following the withdrawal. By allowing the applications to proceed this far three times, the applicant has effectively kept the respondent bound by the requirements of section 79(1) of the *Labour Relations Act* for most of the 6-month period and has kept the employees in virtually a continuous state of expectation that at some point they will be voting as to the applicant's status as their bargaining agent. From the employees' perspective this must appear strange indeed. Besides being strange, it keeps the employees in a state of upheaval. As for the respondent, aside from the disruptive effects of having the statutory freeze on terms and conditions of its employees pursuant to section 79 for a good part of 6 months, in these circumstances the respondent would also be unfairly kept in a state of constant preparation for the next possible application. The unit applied for is a "full-time unit" and includes classifications, the work of which could also be done on a part-time basis, i.e., could be involving less than 24 hours a week. The respondent's concern would be to ensure that when a subsequent application for certification is received, it can quickly determine by using the Board's usual tests whether a particular individual ought to be listed as part of the unit. There must come a point where some relief from all this upheaval occurs. The bar we have imposed is intended to provide this to the employees and to the respondent

for a period of four months from May 30, 1984 since 4 months is soon to elapse and during this time the applicant has been barred from reapplying in any event.

2803-83-R;2804-83-R The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Applicant, v. **Townsend and Bottum of Canada Limited**, Progress Fab Limited, Tuberate and Besomar Company Ltd. and Tuberate Company, Inc., Respondents

Practice and Procedure — Related Employer — Sale of a Business — Employer utilizing various corporate entities in its operations — Whether sale or related employers — Vice-President of international union assuring employer that transaction will not bind it to shops agreement — Assurance binding on signatory local union

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members I. M. Stamp and C. A. Balentine.

APPEARANCES: *A. J. Ahee, J. D. Carroll, J. McManus and M. Bakker for the applicant; M. Addario, D. J. O'Connor and T. A. Kelly for Townsend and Bottum of Canada Limited, Tuberate and Besomar Company Ltd. and Tuberate Company, Inc.; No one appeared on behalf of Progress Fab Limited.*

DECISION OF THE BOARD; September 19, 1984

1. Tuberate and Besomar Company Ltd. and Tuberate Company, Inc. are hereby added as respondents to these proceedings.
2. File No. 2803-83-R is an application under section 63 of the *Labour Relations Act*. File No. 2804-83-R is an application under section 1(4) of the Act. Because the files relate to the same factual issues they were dealt with by way of a single set of hearings. Part-way through the proceedings, counsel for the applicant requested that the Board also treat these matters as a complaint alleging a violation of sections 49, 64 and 66 of the Act. Given the stage of the proceedings at which the request was made, however, the Board denied the request and indicated that any complaint alleging a violation of the Act would have to be dealt with by way of separate proceedings.
3. At issue is the status of the applicant union's bargaining rights with respect to employees working at a shop situated at 530 Vidal Street South in the City of Sarnia. The employer involved accepts the union's claim that it is the bargaining agent for its employees at that location. However, the employer disputes the union's claim that at the time of the filing of these applications it was bound by the terms of a standard form collective agreement generally referred to as the Sarnia area shops agreement. By its terms, the Sarnia area shops agreement was due to expire on August 30, 1984. Given this fact, and the employer's acknowledgement of the union's bargaining rights, we anticipate that this decision will have only a relatively limited impact on the future bargaining relationship between the parties.

4. The employer affected by these applications has at different times utilized a number of different corporate names. Counsel for the employer acknowledges that all of these corporate entities are under common direction or control, and that all of them are controlled, directly or indirectly, by an American company, Townsend and Bottum Inc. which has its headquarters in Ann Arbor in the State of Michigan. For ease of reference we will generally refer to Townsend and Bottum Inc. as well as the various Canadian corporations under its direction or control simply as "Townsend and Bottum".

5. Townsend and Bottum has been active in the United States for approximately 70 years, where it is engaged in, among other things, the construction of power plants and the building and installation of pressure vessels and heat exchangers. The firm is one of the largest employers of boilermakers in the United States. The company regards itself as a "union company" and for many years has had a bargaining relationship with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (the "Boilermakers Union").

6. In August of 1982 Townsend and Bottum commenced operations in Canada, with offices on Lougar Street in the Township of Sarnia. One of the first acts of the company was to meet with Mr. John Carroll, a Canadian based International Vice-President of the Boilermakers Union. The company also signed documents which had the effect of voluntarily recognizing the Boilermakers Union as the bargaining agent for its construction field forces. The company has consistently applied the provisions of the Boilermakers provincial agreement to its construction field forces.

7. When it commenced operations in Canada, the intent of Townsend and Bottum was not only to perform construction work, but also to engage in shop fabrication work. In this regard, it intended to operate a shop in the Sarnia area, which would compete for work both in Sarnia and other areas as well, most notably Western Canada. As already indicated, many of the fabrication shops in and around Sarnia were bound by the terms of the Sarnia area shops agreement. A number of shops outside the Sarnia area, however, were covered by collective agreements with the Boilermakers Union which provided for somewhat lower wage rates.

8. In October of 1982, Townsend and Bottum learned that Besomar Manufacturing Inc. ("Besomar"), a company which operated a shop in Sombra, about 20 miles south of Sarnia, was in financial difficulty. After negotiations with the owners of the company, Townsend and Bottum entered into an arrangement whereby it assumed control of Besomar's operations and also acquired an open-ended option to purchase the company. Townsend and Bottum then took over the day-to-day control of Besomar and became the direct employer of the employees working in the shop. To keep the shop operational, Townsend and Bottum immediately began to put its own money into the shop. Eventually a total of some \$400,000 was put into the shop. While under Townsend and Bottum's control, the Besomar shop was used for the building and repair of heat exchanges, tanks and vessels. The Besomar company had been signatory to a copy of the Sarnia area shops agreement. Because of this, when it began to operate the Besomar shop, Townsend and Bottum also signed a copy of the same agreement.

9. In the summer of 1983 officials of Townsend and Bottum became aware that the Tuberate Company Ltd. ("Tuberate"), was available for purchase. This company leased a fabrication shop in the Village of Point Edward, which is immediately adjacent to the City of Sarnia. At the time, Tuberate's employees were not represented by any trade union. On August 18, 1983 Mr. Dennis O'Connor, the President of Townsend and Bottum Canada Ltd.,

met with John Carroll, the International Vice-President of the Boilermakers Union, to discuss the possible purchase of Tuberate. Mr. O'Connor advised Mr. Carroll that Townsend and Bottum was not interested in purchasing Tuberate if it resulted in the shop being bound by the Sarnia area shops agreement. It was Mr. O'Connor's uncontradicted testimony that Mr. Carroll replied that Townsend and Bottum would be able to negotiate a separate collective agreement for the shop, along the lines of an agreement that the Boilermakers Union had with Alan Tank, a company based in Toronto. Mr. Carroll added that if necessary he personally would come to Sarnia to negotiate such an agreement.

10. In September of 1982 Townsend and Bottum purchased Tuberate, and operated its shop while continuing to operate the Besomar shop. The union contends that during this period certain work was transferred from the Besomar shop to the Tuberate shop. The only evidence relating to this contention is that the Dow Chemical company contacted the Tuberate shop with respect to three heat exchangers that required repair. Due to workload requirements, two of the exchangers were put into the Besomar shop to be worked on. The third exchanger had some initial work done on it at the Besomar shop, but was then sent to the Tuberate shop to receive a nickel overlay. As a result of concerns related to the third exchanger, the Boilermakers Union filed a section 1(4) application (File No. 1518-83-R) the purpose of which was to seek to bind the Tuberate plant to the Sarnia area shops agreement. After discussions between the parties, however, the application was withdrawn by the union. It is clear on the evidence that during the period that Townsend and Bottum operated both the Besomar and Tuberate shops, work continued to be put into the Besomar shop. Revenue from this work permitted Townsend and Bottum to pay off about \$350,000 of the Besomar company's debt, although at no point did Townsend and Bottum receive a return on the money it had invested in the shop.

11. As already noted, the Tuberate company's employees had not been represented by a trade union. Prior to purchasing the company, Mr. O'Connor indicated to Mr. Carroll that Townsend and Bottum favoured the idea of having the Tuberate employees represented by the Boilermakers Union, although not under the terms of the Sarnia area shops agreement. Subsequent to the purchase of Tuberate, officials from the union and Townsend and Bottum discussed how the union could become the bargaining agent for the employees. A new factor entered into these discussions on September 12, 1983 when Mr. O'Connor advised Mr. Matthew Bakker, the business manager of Local 128 of the Boilermakers Union, that Townsend and Bottum was negotiating to take over the lease of a building on Vidal Street in the City of Sarnia which had previously been occupied by a company known as Progress Fab Ltd. The shop is one of the largest in the Sarnia area and apparently had been used by Progress Fab primarily for the construction of very large towers destined for Western Canada. Progress Fab itself had ceased operations in July of 1983 due to financial difficulties. Mr. O'Connor indicated to Mr. Bakker that if Townsend and Bottum were to acquire the Vidal Street shop, all of the employees presently working at the Tuberate shop would be moved to the new location. Mr. Bakker in reply noted that Progress Fab had been signatory to the Sarnia area shops agreement, and stated that in the union's view Townsend and Bottum would become a successor employer to Progress Fab and therefore bound by the Sarnia area shops agreement. Mr. O'Connor disagreed that such would be the case. Mr. O'Connor went on to state that if this is what the union truly believed, then why did it not become certified for the Tuberate shop employees so as to later prevent a non-union company from taking over the Tuberate shop. One other event of note occurred at the September 12, 1983 meeting. Mr. Bakker made it clear that in his view any collective agreement negotiated to cover the Tuberate shop employees had to be based on the terms of the Sarnia area shops agreement.

12. By late November of 1983 the union and Townsend and Bottum had reached an understanding that the union would seek to organize the employees at the Tuberate shop. Following this, Mr. O'Connor suggested to the employees that they meet with the union. The employees later met with officials of the union at a Sarnia area hotel. Subsequent to this meeting, most of the employees signed membership cards in Local 128. On December 20, 1983 the local filed an application for certification. On the date the certification application was to be dealt with by the Board, company and union officials met with a Board Officer and resolved all of the issues in dispute between them. They also agreed to waive their right to a formal hearing into the application. The written material relating to the application was then placed before a differently constituted panel of the Board. Although it is agreed that the parties meant the certification application to apply to the Tuberate shop which was located in the Village of Point Edward, in fact the Board erroneously certified the local union as the bargaining agent of employees "at Sarnia". The certificate correctly named Tuberate and Besomar Company Ltd., as the relevant employer. Tuberate and Besomar Company Ltd. was the corporate entity then being used by Townsend and Bottum to operate the Tuberate plant.

13. As indicated above, by September of 1983 Townsend and Bottum was considering acquiring control of the shop on Vidal Street formerly occupied by Progress Fab. Progress Fab had a sub-lease on the property, the lease being held by Taylor-Forge Canada Limited, a subsidiary of Gulf and Western Realty Corporation in the United States. It appears that some time in September of 1983 Townsend and Bottum commenced negotiations with both Taylor-Forge and Gulf and Western. In October of 1983 the equipment owned by Progress Fab was sold at public auction. Officials of Townsend and Bottum attended at the auction and purchased about \$127,000 worth of this equipment, which represented about one-third of the total value of the equipment put up for sale. Among the equipment purchased by Townsend and Bottum were three overhead cranes mounted on tracks still attached to the building. In December of 1983 Townsend and Bottum entered into a lease with Taylor-Forge Canada Ltd. whereby it was to take occupancy of the Vidal Street shop on January 1, 1984.

14. In January of 1984 Townsend and Bottum moved its construction field forces as well as its management and office staff from the company's original Canadian facility on Lougar Street to the shop on Vidal Street. In early February the employees from the former Tuberate shop were also moved to the Vidal Street shop, with the lease on the Tuberate shop being allowed to lapse in March of 1984. Townsend and Bottum did not hire any of the former employees or management of Progress Fab. Further, it acquired no work in progress, inventory or customer lists from Progress Fab. It also did not acquire, or use, the Progress Fab name. From February until June of 1984 Townsend and Bottum operated both the former Progress Fab shop on Vidal Street as well as the Besomar shop in Sombra.

15. The Board decision certifying Local 128 of the Boilermakers Union as the bargaining agent of the employees at the Tuberate plant was issued on January 12, 1984, shortly before the employees moved to the Vidal Street shop. On February 7, 1984 union and company officials met to negotiate a collective agreement. At this meeting Mr. Bakker, on behalf of the union, indicated that the only terms agreeable to the union were those contained in the Sarnia area shops agreement, with an addendum to deal with one specific job classification. Mr. O'Connor, on behalf of Townsend and Bottum, replied that those terms were not acceptable to the company. On February 14, 1984 the company sent a set of collective agreement proposals to the union. The union did not reply to the proposals. On March 21, 1984, approximately one month after the Tuberate employees had moved to the former Progress Fab shop on Vidal Street, the parties met with a conciliation officer, but made no progress towards a collective agreement.

On April 4, 1984, the Minister of Labour advised the parties that he would not be appointing a conciliation board.

16. As already noted, commencing early February 1984 Townsend and Bottum operated both the former Progress Fab shop as well as the Besomar shop. The company treated the former Progress Fab shop as a continuation of its operations at the Tuberate shop, that is, as a directly owned operation where the employees were represented by the trade union, but not yet covered by a collective agreement. The Besomar shop, however, was operated pursuant to the agreement to purchase with the Besomar company, with the Sarnia area shops agreement being applicable. This situation came to an end in June of 1984 when Townsend and Bottum advised the owners of the Besomar Company that it would not be exercising its option to purchase the company, but instead would be returning the management of the company back to its owners. Mr. O'Connor testified that by this point, Townsend and Bottum had concluded that the Besomar operation could not be made to be profitable. In all, Townsend and Bottum had put some \$400,000 into the Besomar operation without any return, although it had managed to reduce the Besomar Company's debt by about \$350,000. Following its decision not to continue operating the Besomar shop, Townsend and Bottum laid off all the employees at the shop, (as opposed to transferring them to the Vidal Street shop which had at one time been considered) and then returned control of the shop to the Besomar Company's owners. Approximately \$100,00 worth of Townsend and Bottum equipment (but not any equipment owned by the Besomar Company) was transferred from the Besomar shop to the Vidal Street shop. The evidence indicates that subsequent to the withdrawal of Townsend and Bottum from its operations, the Besomar shop has been operated by the owners of the Besomar Company, presumably applying the terms of the Sarnia area shops agreement. Given all of the relevant circumstances, however, we tend to agree with union counsel that the continued operation of the Besomar shop is not something that can be taken for granted.

17. As noted earlier, these proceedings arise out of applications filed under sections 1(4) and 63 of the Act. These sections provide as follows:

"1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise

declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

18. As noted above, Townsend and Bottum utilized various corporate entities in its operations, and all of these corporations were under common direction or control. Townsend and Bottum acknowledges that it would be appropriate for the Board to apply section 1(4) in such a way as to bind its operations at the Vidal Street shop to the bargaining rights acquired by the union with respect to the Tuberate shop. The company, however, disputes the union’s contention that section 1(4) should be applied so as to bind the Vidal Street shop to the Besomar operation where Townsend and Bottum acknowledges that it was bound by the Sarnia area shops agreement. The company contends that section 63 has no application at all. The union, however, takes the position that section 63 is applicable in that there has been a “sale” within the meaning of that section from Progress Fab to Townsend and Bottum. If the union is correct, then the Sarnia area shops agreement which applied to Progress Fab continued to apply to Townsend and Bottum at the Vidal Street location.

19. The parties agree that when it was operating the Besomar shop, Townsend and Bottum was bound by the Sarnia area shops agreement. The company’s subsequent acquisition of the Tuberate shop might under other circumstances arguably be viewed as involving an “accretion” to the union’s existing bargaining rights such that the Tuberate employees should be viewed as also being covered by the agreement. If such an argument were accepted, then section 1(4) could be applied so as to ensure that the use of different corporate forms by Townsend and Bottum did not prevent such a result. In the instant case, however, we are satisfied that the union is estopped from advancing such an argument. We base this conclusion in large measure on the uncontradicted evidence that Mr. Carroll, an International Vice-President of the Boilermakers Union, assured the company that if it acquired the Tuberate shop it could negotiate a separate collective agreement for employees at the shop. At the hearing, union counsel contended that any comments made by Mr. Carroll could not serve to bind Local 128, which was the actual signatory to the Sarnia area shops agreement. We do not agree. Although Mr. Carroll holds no office in the local, he is Vice-President of the International Union of which the local forms a constituent part. Further, Mr. Carroll held himself out as being able to speak for the union, including the local union, on this issue, and in our view it would have been reasonable for officials of Townsend and Bottum to believe he had such authority. We would also note that at the relevant time Local 128 did not contend that the Tuberate shop was covered by the Sarnia area shops agreement. To the contrary, the local applied to the Board to be certified as the bargaining agent for Townsend and Bottum’s employees at the Tuberate shop, an action inconsistent with any claim that the shops agreement was applicable. Given these considerations, we are satisfied that we should view the Besomar and Tuberate shops as distinct operations, the Besomar shop operating under the Sarnia area shops agreement and the Tuberate shop operating initially on a non-union basis, and then as a shop for which the union had bargaining rights but no collective agreement.

20. Characterizing the situation at Vidal Street is more difficult. The union’s primary contention is that Townsend and Bottum purchased the business of Progress Fab Ltd. The fact that Townsend and Bottum acquired a lease on the shop previously occupied by Progress Fab and purchased much of that firm’s equipment, most notably the overhead cranes, tends to

support such a contention. Several other considerations, however, suggest that while Townsend and Bottum acquired the realty and certain equipment of Progress Fab, it did not actually acquire the “business” of Progress Fab. These considerations include the fact that Townsend and Bottum did not acquire the Progress Fab name or any of Progress Fab’s inventory or customer lists. Further, when Townsend and Bottum commenced shop operations on Vidal Street, it moved the employees over from the Tuberate shop, and began to do the same general type of work at Vidal Street as it had been performing at the Tuberate shop. Further complicating this whole matter is the subsequent withdrawal of Townsend and Bottum from the operations of the Besomar shop and the movement of certain of its equipment from the Besomar shop to Vidal Street. Presumably much of the work that Townsend and Bottum would otherwise have performed at the Besomar shop has been performed at its Vidal Street shop, although it is possible that some of this work has been performed by the Besomar Company after it regained control of its shop.

21. The evidence taken as a whole suggests that Townsend and Bottum’s current operations at the Vidal Street shop contain elements of its previous operations at both the Besomar and Tuberate shops, as well as elements of the business previously carried on by Progress Fab. On balance, however, we view the current operations at the Vidal Street shop as being primarily a continuation of Townsend and Bottum’s operations at the Tuberate shop. We have reached this decision in large measure due to the fact that when Townsend and Bottum commenced fabrication work at the Vidal Street shop it ceased its operations at the Tuberate shop and apparently moved those operations, along with the Tuberate employees, over to Vidal Street. This move occurred some seven months after Progress Fab had ceased operations at the Vidal Street location, and approximately four months prior to Townsend and Bottum withdrawing from the Besomar shop.

22. Given our conclusion that Townsend and Bottum’s operations on Vidal Street are primarily a continuation of its previous operations at the Tuberate shop, we are of the view that it would be appropriate to maintain the same collective bargaining relationship at Vidal Street as existed at the Tuberate plant. We are also satisfied that there was not, in fact, a sale of a business within the meaning of the Act from Progress Fab to Townsend and Bottum. In these circumstances, the section 63 application in File No. 2803-83-R is dismissed. We are satisfied, however, that we should exercise our discretion under section 1(4) so as to declare that the Townsend and Bottum Company which had operated the Tuberate shop to be a common employer with the Townsend and Bottum Company now operating the Vidal Street shop.

23. A somewhat complicating factor arises with respect to the geographic scope of the union’s bargaining rights. The Tuberate shop was located in the Village of Point Edward. However, in error the Board certificate issued with respect to the Tuberate operations certified the union as the bargaining agent for employees in Sarnia. As it happens, the Vidal Street shop is in Sarnia. At the hearing, counsel for Townsend and Bottum indicated that notwithstanding the error in the certificate and the fact of the two different municipalities, the company does not object to a Board order binding the Vidal Street operation to the bargaining rights acquired by the union with respect to employees at the Tuberate shop. Given the position adopted by the company, and keeping in mind the rather unique circumstances of this case, we are of the view that this is, in fact, the appropriate way to proceed.

24. The certificate issued to the union named the employer at the Tuberate plant as Tuberate and Besomar Company, Ltd. The Townsend and Bottum Company currently operating the Vidal Street shop is Tuberate Company, Inc. In these circumstances, and pursuant to

its discretion under section 1(4) of the Act, the Board will treat Tuberate and Besomar Company, Ltd. and Tuberate Company, Inc. as a single employer for the purposes of the Act. The Board declares that the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128 is the bargaining agent of employees of Tuberate Company, Inc. in the City of Sarnia, and more particularly those employed at 530 Vidal Street South. The Board further declares that the conciliation procedures followed with respect to Tuberate and Besomar Company Ltd. — inclusive of the “No Board” report issued on April 4, 1984 — are applicable to Tuberate Company, Inc. at its operations in Sarnia.

25. Given our findings and declarations set out above, we are satisfied that the Sarnia area shops agreement did not apply to Townsend and Bottum’s operations at the Vidal Street shop. As indicated at the outset of this decision, however, the Sarnia area shops agreement stipulates that it was to expire on August 31, 1984. Accordingly, at this point in time, the union stands in approximately the same position it would have been in had the Sarnia area shops agreement applied to the Vidal Street shop, namely, in a position to negotiate for a new collective agreement applicable to the shop.

26. To summarize, the section 63 application in File No. 2803-83-R is dismissed. The section 1(4) application in File No. 2804-83-R is granted in the terms set out in paragraph 24 above.

ADDENDUM OF BOARD MEMBER C. A. BALLENTINE;

I have joined in the award of the Board. I would note, however, that absent the transfer of operations from the Tuberate shop to the shop on Vidal Street, I would have found a sale of a business from Progress Fab to Townsend and Bottum.

1015-84-M Dudley S. Burke, Applicant, v. Retail, Wholesale and Department Store Union Local 414, chartered by the Retail Wholesale and Department Store Union AFL;CIO;CLC;, Respondent Trade Union, v. **Vanfax Corporation**, LOF Glass of Canada Ltd., Respondent Employer

Religious Exemption — Applicant leaving employment of present employer — Working for unionized employer and paying union dues for four years — Returning to present employer prior to organizing campaign — Whether refusal to pay union dues due to reawakening of religious beliefs — Exemption granted

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Dudley Burke on his own behalf; Hugh Buchanan and Frank Richards for the respondent trade union; Norman A. Keith and S. Locke for the respondent employer.*

DECISION OF RORY F. EGAN, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON;
September 25, 1984

1. This is an application under section 47 of the *Labour Relations Act* for exemption on the grounds of religious conviction or belief from the union security provisions in a collective agreement between the respondent trade union (hereinafter “the union”) and the respondent company (hereinafter “the company”).

• • •

3. The collective agreement is a first agreement running from February 1984 to February 1986. The application is therefore timely.

4. The applicant set forth the basis for his objections in the application in the following terms:

I do not condemn trade unions, neither do I discriminate against anyone who seeks protection from such organization.

I totally believe in the rights of individuals, and I am not against collective bargaining.

I believe that the only one I can put confidence and trust in is God. He is the only one who is capable of delivering from any injustice, therefore to do otherwise is to give up that trust.

So because of my religious beliefs, I cannot join myself to any organization who might ask me to do some things contrary to my beliefs, such as strike, with-holding service, ext. [sic].

I also cannot support financially such an organization. I believe that my strength and ability to work comes from God, therefore all that I possess is His, including my money. It is entrusted to me to be used wisely and to His glory, of which I will have to give an account.

I do not believe that the money will be used by the union in a way that will be pleasing to God.

I believe that this money could be used to benefit those who are in need of humanitarian help.

It is very unsafe for a Christian to go against his or her conscience.

5. The applicant gave evidence in support of his application. He had been employed by the company from 1971 to 1977 at which time he was laid off. There was no union at the company during this period.

6. In 1977 the applicant went to work for the Butler Company in Kitchener. There was a union at the Butler Company when the applicant was hired there. The applicant remained at Butler's for 4 years, until 1981, and throughout that period he paid union dues. He was laid off by Butler's in 1981 and applied for employment at the company where, as already stated, he was taken on on January 6, 1982.

7. The applicant stated that had the union been bargaining agent at Vanfax at the time he applied to be hired the second time, he would not have gone to work there because of his religious beliefs and convictions.

8. The applicant explained that when he went to Butler's, his religious beliefs and convictions, instilled in him by a religious family, had been allowed by him to lapse. He said that after being at Butler's for some time, he became more interested in his religious life. He inquired of the union steward at Butler's about what steps he could take to get out of the union. Upon being told that because a collective agreement with a union security clause was in existence when the applicant had joined Butler's, there was nothing he could do, he accepted the advice of the union and made no further inquiries. He said that he tried to get work elsewhere but continued to work under the union security clause and pay his dues until he was laid off in 1981.

9. The applicant reaffirmed the position he had set out in his application. He also testified that his religious convictions and beliefs had intensified in the latter days of employment at Butler's.

10. He testified that his convictions are based on the Bible and the teachings of the Lord. He would like to submit money to the Lord rather than strike against his employer. He believes that the employees are subject to God. If the employer is unjust, it is for the applicant to look to God alone for justice.

11. He is an elder in his Seventh Day Adventist Church and endorses the position taken by that church that a church member is following the teaching of the church when, because of his religious convictions, he refuses to join or financially support labour unions.

12. As was said by the Board in the *Sheraton Ltd. — Sheraton-Connaught Hotel* case, [1972] OLRB Rep. Mar. 249:

... no matter how ill founded or incomprehensible an applicant's view may appear to this Board, we are quick to point out that we are not to sit in

judgment on that religious conviction or belief but what we are concerned with is, does the applicant sincerely have a religious conviction or belief or is the applicant merely attempting to avoid its obligations to the trade union by fabricating a religious conviction or belief.

We would add that we are primarily concerned with the personal convictions of the applicant and not with doctrines of the religious group or church with which he claims affiliation.

13. In assessing the applicant's evidence in the present case, the Board had, in considering the matter of his sincerity, been particularly concerned with the apparent conflict between his compliance with the terms of the union security clause for four years while working at Butler's and his present objections.

14. We have, however, had the opportunity to see the applicant and hear his explanation with respect to the re-awakening of religious convictions during his employment at Butler's, together with his testimony concerning his approach to a union steward in order to find out how he could avoid the payment of dues. We are now of the view that the applicant's explanation is credible and acceptable.

15. The Board finds the applicant to have been a credible witness in all of his testimony and is satisfied that his beliefs and convictions are sincerely held and constitute the true root of his objections to joining the union and paying union dues. Those beliefs, which the applicant finds are rooted in the Bible, are properly called religious beliefs.

16. The Board therefore orders and directs that the provisions of the collective agreement between the respondent employer and the respondent union which are of the type mentioned in section 46(1)(a) of the Act do not apply to the applicant and, accordingly, the applicant is not required to join the respondent union, to be or to continue to be a member of the respondent union or to pay any dues, fees or other assessments to the respondent union provided that amounts equal to any initiation fees, dues or other assessments are paid by the applicant to, or are remitted by, the respondent employer to a charitable organization mutually agreed upon by the applicant and the respondent union.

17. However, if the applicant and the respondent trade union fail to agree on such charitable organization, the Board, upon the request of either the applicant or the respondent union will designate, pursuant to the provisions of section 47(1) of the Act, a charitable organization registered as such in Canada under Part I of the *Income Tax Act (Canada)*.

DECISION OF BOARD MEMBER H. KOBRYN;

1. I dissent.

2. I cannot accept the decision of the majority in this case. I have very strong suspicions about the applicant's statement in regards to his religious beliefs and the paying of his dues to this union, especially when you consider the fact that when this applicant left the employ of this present employer, he went to work in a union shop for four years. In all those four years he did not once reject the benefits he had received from the union's bargaining efforts on his behalf and on behalf of all the other employees in that plant. Also, for those four years, he paid his union dues.

3. After he returned to this present employer, the union organized this plant and was certified by this Board. The union had to strike this employer in order to get its first agreement. This applicant worked through the whole of the strike. Again he did not refuse to accept any of the benefits the union won for all the employees through a hard-fought strike.

4. My suspicions that this application is just another ploy by this applicant not to pay dues to the union are further strengthened by the strong manner in which counsel for the employer interjected himself into the proceedings. The employer's counsel, by his strong representation on behalf of the applicant, might as well have been the Counsel of Record for the applicant. This strong interjection by counsel for the employer into a quarrel which is basically between the applicant and the legally-certified union further supports my suspicions that there could be a totally different motive behind this application than the one stated. I feel that in cases such as this the Board has to be most vigilant and must scrutinize these bald statements of religious beliefs dealing with union membership and the paying of union dues.

5. For all of the above reasons I would have dismissed the application.

**2017-83-R The Ontario Secondary School Teachers' Federation, Applicant,
v. Board of Education for the City of York, Respondent**

Employee — Trade Union — Trade Union Status — Whether inclusion of persons exercising managerial functions depriving organization of trade union status — Whether OSSTF “trade union” within meaning of LRA — Meaning of “Teacher” considered — Teachers at children's residence found to be teachers and excluded from LRA

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. G. Donnelly and B. L. Armstrong.

APPEARANCES: *Maurice A. Green and Fred Birket for the applicant; D. W. Brady and Paul Martindale for the respondent.*

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; September 10, 1984

1. This is an application for certification in which the applicant seeks bargaining rights under the *Labour Relations Act* with respect to the following bargaining unit:

all teachers employed by the respondent at Humewood House School, 40
Humewood Drive, in the Municipality of Metropolitan Toronto.

When this application first came on for hearing before the Board, the only issue on which the parties disagreed was the status of the applicant as a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board heard the parties' argument on that issue, and later issued an interim decision (now reported at [1984] OLRB Rep. Jan. 160), the relevant portions of which are as follows:

7. At the conclusion of the argument on status, the Board asked how it was that the "teachers" who are the subject of this application were not covered by the SBTCNA [*School Boards and Teachers Collective Bargaining Act*]. This question was prompted, in part, by the following reference in paragraph 7 of the application for certification:

The teachers covered by this application have been found by a Board of Arbitration composed of Ross Kennedy, Jack Baker and Douglas Know [sic] (dissenting) not to be covered by the subsisting collective agreement between the OSSTF District 14 and the Respondent, entered pursuant to the School Boards and Teachers Collective Negotiations Act.

8. Counsel for both parties agreed that the employees covered by this application are not "teachers" within the meaning of the SBTCNA. We were told that these employees teach in a program established under section 15 of the "General Legislative Grants" regulation made under *The Education Act* (currently O. Reg. 221/83). The parties said that these teachers therefore do not possess all the attributes required by the definition of "teacher" in the SBTCNA.

9. The Ontario Labour Relations Board has no jurisdiction to entertain this certification application if the employees for whom the applicants seeks bargaining rights are "teachers" within the meaning of the SBTCNA. The agreement of the parties cannot give us a jurisdiction which we do not otherwise have. The applicant's agreement that these are not "teachers" within the meaning of the SBTCNA may be the practical consequence of a binding arbitration decision to that effect. We are not bound by the Kennedy award, nor does that award give us a jurisdiction which we do not otherwise have. Having now had an opportunity to review the statutes, regulations and authorities referred to in argument, as well as other authorities in the area, we are in doubt whether we have jurisdiction to entertain this application, having regard to section 2(f) of the *LRA*. We require the further assistance of the parties, upon whom we will have to rely to provide us with the factual foundation necessary to make our own judgement with respect to this issue.

The application was, accordingly, re-listed for hearing.

2. The definition of "teacher" in the School Boards and Teachers Collective Negotiations Act (hereinafter referred to, as the parties did in argument, as "Bill 100"), was a matter which had been dealt with in the arbitration award ("the Kennedy award") referred to in the above-quoted passage from our decision of January 19, 1984. At the resumed hearing, the parties adopted the same positions on this issue as had been taken by them before the arbitration board chaired by Mr. Kennedy. This, of course, resulted in the applicant arguing that while it was a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, the employees for whom it was seeking bargaining rights under that Act were, in its view, "teachers" within the meaning of Bill 100, a position which, if accepted by this Board, would result in the dismissal of this certification application. The respondent took the position that the employees affected by this application were not "teachers" within the meaning of Bill 100,

with the result that this Board would have jurisdiction to entertain this application but for the applicant's lack, as the respondent argued, of trade union status.

3. The parties put before us the Kennedy award of September 16, 1983, and accompanying dissent of Mr. Knott. They agreed that the Board could assume the correctness of the contents of an Agreed Statement of Facts recited in the Kennedy award, portions of which are as follows:

AGREED STATEMENT OF FACTS

1. The Ontario Secondary School Teachers' Federation District 14 is a branch affiliate as defined in the School Boards and Teachers Collective Negotiations Act, R.S.O. 1980 (Bill 100) and the Board of Education for the Borough of York is a board as defined by Bill 100.

2. By letter dated November 30th, 1981, District 14 formally requested the inclusion of 7 named teachers, teaching at Humewood House, in the Bargaining unit represented by the branch affiliate . . .

3. Humewood House was opened as a home for unwed mothers in 1912. It was then operated by the Church of England. In 1966, the Humewood House school program was created with certified teachers provided by the York Board of Education, to provide an education program for the residents. By 1972, the residential program became more oriented towards providing treatment for troubled youngsters as the need for residential maternity placements declined.

4. In 1977 a more community oriented program was launched to provide care for ex-residents of Humewood and other teenagers, who needed to be admitted for care on a "day treatment" basis. Humewood House is a children's residence licensed under the Children's Residential Services Act 1978.

5. Teenagers admitted to Humewood House for the residential program, or the "day treatment" program *may* be registered in the regular day school as well.

6. The York Board presently employs six teachers to teach credit courses at the secondary school level, to such students.

7. The "school" program is necessary so that the education of the teenager admitted for care and treatment does not suffer. Once a teenager is admitted to the residential program and attendance at a regular school, or special class is not possible, or appropriate, the staff of Humewood House and the teachers, develop suitable arrangements and plans for the student's education.

8. As students may be admitted or leave Humewood House at any time during the year, each student is provided an individualized program. Credit courses are offered at the secondary levels, 3, 4 and 5. The ages of students

range from 13 — 21 with a majority falling between the ages of 14 — 17 years. The number of students range from 29 to 35. Students are granted credits towards the Secondary School Graduation Diploma. Credits are granted at the Humewood House.

9. The Humewood House facility provides, and is responsible for the treatment and social work staff and the York Board provides and is responsible for the teaching staff.

10. Although the teachers function as members of a multi-disciplinary team, they are responsible for teaching courses as prescribed by the York Board and Ministry of Education. Ontario Student Records are kept for such students at Vaughan Road Collegiate (for security reasons).

11. The teachers are and must be qualified, pursuant to the Education Act, to teach their respective subjects. They report through a Key School Tutor and are responsible to the Co-ordinator of Guidance, who in turn reports to the Assistant Superintendent of Instruction in charge of special services. When required, supply teachers are paid by the York Board with arrangements being made internally from a list provided by the Co-ordinator of Guidance.

12. Teachers who held "interim" teaching certificates pursuant to the *Education Act* and Regulations were granted permanent teaching certificates upon recommendation of the responsible supervisory officer of the York Board based upon their teaching at Humewood House.

13. By letter dated June 25th, 1982 after having failed to solve the differences between each other, District 14 filed a grievance concerning the teachers at Humewood House. By letter dated 7th of September, 1982, the York Board responded that they considered the question not grievable . . .

14. The teachers employed by the York Board and teaching at Humewood House are required to submit contributions to the Teachers Superannuation Commission pursuant to the Teachers Superannuation Act 1980 R.S.O. . . .

15. There have developed operational guidelines for the School. . . The Report was developed by teachers, the Guidance Co-ordinator and Humewood House employees.

16. The York Board entered into an agreement with Humewood House to provide an educational program. . . Funding comes from the Ministry of Education through the York Board.

A number of the documents introduced as exhibits before the arbitration board were provided to us, and each of the parties called *viva voce* evidence to supplement and amplify these materials.

4. Humewood House is a residential facility operated by the Humewood House Association and licensed as a children's residence under the *Children's Residential Services Act*. The

agreement dated July 13, 1982 referred to in paragraph 16 of the Agreed Statement of Facts, an agreement between the respondent board and Humewood House Association, is expressly made pursuant to section 15 of Ontario Regulation 197/82: General Legislative Grants 1982, a regulation made under the *Education Act*. Section 15 provides, in part, as follows:

15.-(1) Where a board employs a teacher to provide an educational program in,

(a) a children's residence licensed under the Children's Residential Services Act;

that is situate within the area of jurisdiction for the board . . . and the Minister approves such education program, the board shall be paid a grant equal to the expenditure in 1982 for salary and related employee benefits of the teacher and an additional amount not in excess of \$1,600 per teacher in respect of the expenditure of the board for administrative, consultative and supervisory services and for the purchase of instructional supplies in respect of such program.

(2) The approval of the Minister referred to in subsection (1) shall be given only where the board has entered into a written agreement with the facility, home or institution, or the administrator thereof, setting out the responsibilities of the facility, home or institution for the provision of accommodation and the responsibilities of the board for the provision of the education program, including the number of teachers that the board agrees to provide.

The "section 15 agreement" between the respondent board and Humewood House Association covers the matters addressed in section 15(2) above, including the Board's commitment that it "shall at its own expense supply a sufficient number of properly qualified teachers to provide a special education program at 40 Humewood Drive", and the association's commitment that it "shall provide the space to accommodate the special education program to be conducted in the premises of the association and now situated at 40 Humewood Drive" during the 1982-83 school year. Provisions substantially similar to section 15 of O.Reg. 197/82 have for some time been a feature of the annual General Legislative Grants regulations made under the *Education Act*. The education program at Humewood House existed both before and after the 1982-83 school year, as a result of similar agreements made pursuant to the predecessor and successor regulatory provisions. In the 1982-83 year, the respondent school board was also party to section 15 agreements with the Thistletown Regional Centre for Children and Adolescents and the Earls court Child and Family Centre; each of those agreements also commits the school board to providing teachers for an educational program conducted in premises supplied by the participating institution (as required by sub-section 15(2) of the regulation). In those two cases, however, the premises supplied by these institutions are school rooms in school buildings owned by the respondent school board; the school board leased the rooms to these institutions at a nominal annual rent of \$1.00 in order that the institutions could satisfy the prerequisites of sub-section 15(2). The respondent school board has treated the teachers engaged in the Thistletown and Earls court programs as being covered by the applicable collective agreement negotiated under Bill 100.

5. The respondent school board introduced the *viva voce* evidence of Paul Martindale, who is the Superintendent of Personnel of the respondent. During the period 1979-1982, he

was Assistant Superintendent of Student Services for the respondent school board and, in that capacity, hired and fired, and otherwise fulfilled the role of supervisory officer with respect to, the teachers engaged by the school board for the education program at Humewood House. The thrust of Mr. Martindale's evidence was that the educational program at the Humewood House is not operated in the same manner as a "regular day school". There is no on-site principal; in his view, no one performs at Humewood House the duties of a principal as prescribed by the *Education Act* and regulations thereunder. The educational program operates four days per week, whereas in a regular day school instruction occurs on each of the five days of a regular week. He noted that Regulation 822/82 prescribes the characteristics of a "school year", and requires the school board to submit to the Minister of Education the school calendar or calendars to be followed in the schools under its jurisdiction. Mr. Martindale said that the respondent school board had never submitted a calendar with respect to the Humewood House program, and that the scheduling of the education program at Humewood House did not lend itself to compliance with Regulation 822/82. In cross-examination, Mr. Martindale acknowledged (as did the Agreed Statement of Facts) that this educational program provided credit courses in which students could and did obtain credits toward the secondary school graduation diploma. The students in the program have to complete 110 hours of study in order to obtain a credit, and this is the same requirement which applies to students in the "regular day school" program. Mr. Martindale acknowledged that such credits must be granted by a school principal. He conceded that this must be so with respect to the credits granted to students enrolled in the educational program at Humewood House, although he was not sure whether the principal involved in granting credits is the principal at Vaughan Road Collegiate, the school at which these students' school records are maintained. Mr. Martindale said that a student in a regular day school could not complete the usual number of credits per year if his hours of instruction were equal only to the number of hours provided in the four day per week schedule on which Humewood House operates. He acknowledged, however, that there are students in regular day school programs who take less than the usual number of credit courses without offending any of the rules which apply to students in those programs.

6. The applicant called as its witness Nancy Hall, an employee of the respondent who has been teaching at Humewood House since 1977. She is fully qualified as a teacher under the *Education Act*; she taught at schools in Etobicoke and North York prior to becoming involved in the respondent's educational program at Humewood House. She explained that the educational program's schedule is set up to operate during the regular school year, September to June, with the same school breaks as are enjoyed in the regular day school program, and that the only difference between the Humewood House program and a regular day school program was that instruction is scheduled in a four day week rather than a five day week. Pupils enrolled in the Humewood House educational program are adolescent females; a number are either pregnant or have infant children. There are a small number of pupils who for some other reason are unable to cope with the regular school program and have been referred to Humewood House by Children's Aid or another school. The four day per week instruction schedule is designed to permit the scheduling of counselling and other services and programs for these pupils on the fifth day of each week. Students under sixteen are expected to take a full timetable which, at Humewood House, involves classes in three or four subjects per semester. Teachers keep track of the attendance of students under sixteen years of age, and understand they are to refer delinquency problems to the school board if the Humewood House staff are unable to resolve them with the student concerned. Attendance records are also used to assess whether students have filled the requirement of 110 hours of classroom instruction "or equivalent" required in order to obtain school credits. These attendance records are maintained at Vaughan Road Collegiate.

RELEVANT LEGISLATION

7. Resolution of the issues raised in this case requires examination of the provisions and history of four Ontario statutes: the *Education Act*, R.S.O. 1980, c.129, as amended; the *Teaching Profession Act*, R.S.O. 1980, c. 459; the *School Boards and Teachers' Collective Negotiations Act*, R.S.O. 1980, c. 464; and the *Labour Relations Act*, R.S.O. 1980, c. 228.

The Education Act

8. This Act, first enacted in 1974 (c. 109), was an amalgamation and revision of a number of statutes dealing with elementary and secondary education. One of those statutes was *The Schools Administration Act*, from which the *Education Act* has derived several of the provisions with which we will be concerned here. *The Schools Administration Act* was first enacted in 1954, and was itself an amalgamation and revision of several statutes. One of those was *The School Trustees' and Teachers' Boards of Reference Act*, S.O. 1953, c. 96, which had originally been enacted as *The Teachers' Board of Reference Act* in 1938 (c. 52). From a teacher's perspective, the theme of that Act was that a teacher under written contract with a school board was entitled to written notice of and reasons for any termination of that contract, and could apply to the Minister for the appointment of a Board of Reference to enquire into the propriety of any such termination. The provisions of various statutes required that a school Board's contract with a teacher be in writing, although it was held that this would not apply to a temporary teacher (a term not then defined by statute): *Re Public School Board of Section No. 7, Township of East York and MacKenzie* (1931) 40 O.W.N. 84, [1931] 2 D.L.R. 558. The concept of prescribing by regulation the form and terms of a teacher's contract first appeared in *The School Law Amendment Act*, 1945, c. 8, which amended *The Department of Education Act* to authorize the making of regulations prescribing the form of contract to be used "for every contract entered between a board and a teacher for the services of a teacher" (S.O. 1945, c. 8, s. 4(e)) and regulations prescribing the terms and conditions deemed to be included in every such contract "whether or not such terms and conditions are actually set out in the contract" (s. 4(f)). The provisions of *The Public Schools Act* and *The High Schools Act* which referred to the requirement of a written contract (R.S.O. 1937, c. 357, s. 106(1) and c. 360, s. 56(1), respectively) were amended in 1949 (S. O. 1949, c. 84, s. 9, and c. 38, s. 17, respectively) to provide that such a contract be in the form prescribed by regulations under *The Department of Education Act*. At that time *The Public Schools Act*, R.S.O. 1937, c. 57, s. 1(n) defined "teacher" as "a person holding a legal certificate of qualification". *The Department of Education Act* and *The High Schools Act* were amended in 1952 (c. 18 and c. 36), and *The Public Schools Act* was similarly amended in 1953 (c. 90), to provide for various categories of teacher: "permanent teacher", "probationary teacher", "temporary teacher" and "occasional teacher", and the provisions of *The High Schools Act* and *The Public Schools Act* requiring that each teacher's contract be in prescribed form were amended to apply this requirement only to the employment of permanent and probationary teachers.

9. The teacher categories and contract prescriptions of *The High School Act* and *The Public Schools Act* were carried into *The Schools Administration Act*, 1954 (S.O. 1954, c. 86) in these terms:

1. In this Act,

(g) "occasional teacher" means a teacher employed to teach on a daily basis as a substitute for a permanent, probationary or temporary teacher;

- (h) "permanent teacher" means a teacher employed on a continuing basis, but does not include a temporary teacher or occasional teacher;
- (i) "prescribed" means prescribed by the regulations;
- (j) "probationary teacher" means a teacher employed a probationary period,
 - (i) of not more than two years for a teacher with less than three years experience before the commencement of the contract, or
 - (ii) of not more than one year for a teacher with three or more years experience before the commencement of the contract,
 leading to an appointment as a permanent teacher if his services are satisfactory to the board but does not include a temporary teacher or an occasional teacher;
- (k) "regulations" means regulations made under *The Department of Education Act, 1954*;
- (o) "temporary teacher" means a teacher employed to teach on a monthly basis for a period not exceeding one year.

17.-(1) A memorandum of every contract of employment between a board and a permanent teacher or a probationary teacher shall be made in writing in the form of contract prescribed by the regulations, signed by the parties, sealed with the seal of the board and executed before the teacher enters upon his duties, but if for any reason such memorandum is not so made, every contract shall be deemed to include the terms and conditions contained in the form of contract prescribed for a permanent teacher and the teacher's salary shall be payable in ten monthly payments in the manner provided therein.

The School Trustees' and Teachers' Boards of Reference Act became Part III of *The Schools Administration Act*; the right to written reasons for termination and to apply for a Board of Reference were thereafter accorded only to "permanent" teachers.

10. Despite the earlier statutory provision for it, a form of contract was not prescribed by regulation until 1954, after the enactment of *Department of Education Act, 1954*. O.Reg. 75/54 prescribed forms for a Permanent Teachers Contract and a Probationary Teachers Contract. The terms of the Permanent Teacher's Contract provided for in O. Reg. 75/54 were these:

1. The Board agrees to employ the Teacher as a permanent teacher and the Teacher agrees to teach for the Board commencing the of, 19.. at a yearly salary of Dollars, subject to any changes in salary mutually agreed upon by the Teacher and the Board, payable in . . . (not fewer than 10) payments, less any lawful deduction, in the following manner:

- (a) where there are 10 payments, one-tenth on or before the last teaching day of each teaching month; or
- (b) where there are more than 10 payments, at least one-twelfth on or before the last teaching day of each teaching month, any unpaid balance being payable on or before the last teaching day of June, or at the time of leaving the employ of the board, whichever is the earlier.

2. This Agreement is subject to the Teacher's continuing to hold qualifications in accordance with the Acts and regulations administered by the Minister.

3. The Teacher agrees to be diligent and faithful in his duties during the period of his employment, and to perform such duties and teach such subjects as the Board may assign under the Acts and regulations administered by the Minister.

4. Where the Teacher attends meetings of an institute conference or a regional educational conference for which the school has been legally closed and his attendance thereat is certified by the inspector or the chairman of the meeting or conference, the Board agrees to make no deductions from the Teacher's salary for his absence during that attendance.

5. Where an Act of Ontario or a regulation thereunder authorizes the Teacher to be absent from school without loss of pay, the Board agrees that no deduction from his pay will be made for the period of absence so authorized.

6. This Agreement may be terminated,

- (a) At any time by the mutual consent in writing of the Teacher and the Board; or
- (b) on the 31st day of December in any year of the Teacher's employment by either party giving written notice to the other on or before the last preceding 30th day of November; or
- (c) on the 31st day of August in any year of the Teacher's employment by either party giving written notice to the other on or before the last preceding 31st day of May.

7. The Teacher agrees with the Board that in the event of his entering into an Agreement with another Board, he will within 48 hours notify the Board in writing of the termination of this Agreement unless the notice has already been given.

8. This Agreement shall remain in force until terminated in accordance with any Act administered by the Minister or the regulations thereunder.

The Probationary Teacher's Contract was in identical terms, except that, in paragraph 1 the

words “as a permanent teacher” are replaced by the words “as a probationary teacher for a probationary period of . . . years”.

11. Apart from the adoption in the 1960 revisions of the existing definition of “teacher” in *The Public Schools Act*, the teacher definitions in *The Schools Administration Act* remained unchanged until 1966, when the definition of “occasional teacher” was amended by striking out the words “on a daily basis” (S.O. 1966, c. 140, s. 1(1)), and the definition of “temporary teacher” was repealed and replaced with this (S.O. 1966, c. 140, s. 1(2)):

“temporary teacher” means a person employed to teach under the authority of a letter of permission.

The meaning of “a person employed to teach under the authority of a letter of permission” comes clear upon examination of subsection 11(1)(d) of *The Department of Education Act*, R.S.O. 1960, c. 94:

11. — (1) The Minister may,

(d) grant a letter of permission to a board authorizing the board to employ an unqualified person as a teacher if the Minister is satisfied that no qualified person is available, but a letter of permission shall be effective only for the period, not exceeding one year, that the Minister specifies therein;

In short, until 1966, a “temporary teacher” was a person qualified to teach; thereafter, a “temporary teacher” was a person not qualified to teach.

12. In 1969, section 17(1) of *The Schools Administration Act*, dealing with the prescribed form of contract, was amended to add “or has not been amended to incorporate any change made in the form of contract so prescribed” after the words “if for any reason such memorandum is not so made” (S.O. 1968-69, c. 114, s.2). In 1971, section 17(1) (which became 16(1) in the 1970 revisions), was further amended to strike out the words “and the teacher’s salary shall be payable in ten monthly payments in the manner provided therein” (S.O. 1971, c. 90, s. 2(2)). In 1973, the definition of “occasional teacher” was repealed (S.O. 1973, c. 92, s. 1(1)) and the following was substituted:

“occasional teacher” means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of the school year.

13. These provisions of *The Schools Administration Act* were carried forward into *The Education Act*, 1974, with some refinement and rearrangement. The definition of teacher was modified then, and again in 1982 (c. 32, s. 1(2)), but the definition continues to describe a person legally qualified to teach. The requirement of a contract in prescribed form was carried over into what is now sub-section 230(2). This and other provisions formerly found in Part II of *The Schools Administration Act* were grouped together with Part III of that Act (the Board of Reference provisions) to form Part IX (now sections 230 to 248) of the *Education Act*. The restraint on the probationary period formerly built into the definition of “probationary

teacher” was restated as an explicit restraint in a new section, now s. 232. A definition of “part-time teacher” was added, and provisions referring to part-time teachers were introduced in what is now section 231 of the Act. In the result, the *Education Act*, R.S.O. 1980, c. 129, as amended, now contains the following definitions:

- 66. “teacher” means a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or a secondary school in Ontario;
- 67. “temporary teacher” means a person employed to teach under the authority of a letter of permission;
- 35. “permanent teacher” means a teacher employed by a board under a permanent teacher’s contract made in accordance with the regulations and includes a teacher whose contract is deemed to include the terms and conditions contained in the form of contract prescribed in the regulations for a permanent teacher;
- 41. “probationary teacher” means a teacher employed by a board under a probationary teacher’s contract made in accordance with the regulations;
- 31. “occasional teacher” means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year;
- 33. “part-time teacher” means a teacher employed by a board on a regular basis for other than full-time duty;

Section 8(1)(j) of this Act sets out the Minister’s power to grant a letter of permission in substantially the same terms as did section 11(7)(d) of *The Department of Education Act*, R.S.O. 1980, c. 94 reproduced in paragraph 11 above.

14. Section 230 of the *Education Act* provides:

230.-(1) A full-time or part-time teacher who is employed by a board and who is not an occasional teacher shall be employed as a permanent or a probationary teacher.

(2) A memorandum of every contract of employment between a board and a permanent teacher or a probationary teacher shall be made in writing in the form of contract prescribed by the regulations, signed by the parties, sealed with the seal of the board and executed before the teacher enters upon his duties, but if for any reason such memorandum is not so made, or has not been amended to incorporate any change made in the form of contract so prescribed, every contract shall be deemed to include the terms and conditions contained in the form of contract prescribed for a permanent teacher.

In every respect material to any issue in this case, the forms of contract now prescribed by regulation under the *Education Act* (R.R.O. 1980, Reg. 277) are identical to the forms first prescribed in 1954 (see paragraph 10, *supra*). References in paragraph 4 of the contract to "institute conference or a regional educational conference" and to "inspector" have been replaced by "education conference" and "supervisory officer", respectively. A paragraph has been added to the Permanent Teachers Contract dealing with transfer of a teacher by a board from one municipality to another. A paragraph has been added to the Probationary Teachers Contract providing that if the contract is not terminated at the conclusion of the probationary period, the teacher is deemed employed as a permanent teacher. Otherwise, these contracts remain word for word the same as in O.Reg. 75/54.

15. The rights of full-time teachers are distinguished from those of part-time teachers in section 231 of the *Education Act* which now provides, in part, as follows:

231.(1) Unless otherwise expressly agreed and subject to subsections (2) and (5), a teacher is entitled to be paid his salary in the proportion that the total number of school days for which he performs his duties in the school year bears to the total number of school days in the school year.

(2) Subject to subsection (3), a permanent, probationary or temporary teacher is entitled to his salary for a total of twenty school days in any one school year in respect of his absence from duty on account of his sickness . . .

(3) A part-time teacher is entitled to his salary for 10 per cent of the periods of instruction and supervision specified in the agreement for his employment in any one school year in respect of his absence from duty on account of his sickness . . .

With respect to probationary teachers, section 232 provides:

A board shall not offer to a teacher, and no teacher shall accept, a contract as a probationary teacher for a period greater than,

(a) two years where the teacher has less than three years' experience; and

(b) one year where the teacher has three or more years' experience,

as a teacher in an elementary or secondary school in Ontario before the commencement of the contract.

Sections 238 to 248 cover the same ground as Part III of *The Schools Administration Act* did, affording permanent teachers the right to written reasons for dismissal and the right to challenge the termination of their contract by applying to the Minister of Education for the appointment of a Board of Reference, a tri-partite tribunal empowered to inquire into the dispute and to direct either the continuance or the discontinuance of the employment contract.

16. Sections 149 and 150 deal with the duties and powers, respectively, of school boards. Those sections provide, in part:

149. Every board shall,

6. provide instruction and adequate accommodation during each school year for the pupils who have a right to attend a school under the jurisdiction of the board;
10. ensure that every school under its charge is conducted in accordance with this Act and the regulations;
11. keep open its schools during the whole period of the school year determined under the regulations, except where it is otherwise provided under this Act;
12. appoint for each school that it operates a principal and an adequate number of teachers, all of whom shall be qualified according to this Act and the regulations;

150.-(1) A board may,

2. subject to Part X, appoint and remove such officers and servants and, subject to Part IX, appoint and remove such teachers as it considers expedient, determine the terms on which such officers, servants and teachers are to be employed, prescribe their duties and fix their salaries
...
10. organize and carry on gymnasium classes in school buildings for pupils or other during the school year or in vacation or both, and provide supervision and training for such classes, provided the proper conduct of the school is not interfered with;
14. establish kindergartens and junior kindergartens;
29. establish summer schools for pupils;
31. establish evening classes;
37. employ and pay teachers, when so requested in writing by a charitable organization having the charge of children of school age, for the education of such children, whether such children are being educated in premises within or beyond the limits of the jurisdiction of the board, and pay for and furnish school supplies for their use;
38. with the approval of the Minister, employ and pay teachers to conduct an education program in a centre, facility, home, hospital or institution that is approved, designated, established, licensed or registered under any Act and in which the Ministry does not provide an education program and provide instructional supplies and consultative help for the pupils therein and permanent improvements for the classrooms connected therewith;

The terms "school" and "school year" are defined in section 1(1) as follows:

"school" means,

- i. the body of public school pupils or separate school pupils or secondary school pupils that is organized as a unit for educational purposes under the jurisdiction of the appropriate board, or
- ii. the body of pupils enrolled in any of the elementary or secondary school courses of study in an educational institution operated by the Government of Ontario,

and includes the teachers and other staff members associated with such unit or institution and the lands and premises used in connection therewith;

54. "school year" means the period prescribed as such by, or approved as such under, the regulations;

The term "school year" is used in section 149 to describe the period during which a school must be open, and in Part II of the Act to describe the period during which pupils of school age are obliged to attend school. O.Reg. 822/82 requires that the school year commence on or after the 1st day of September and end on or before 30th day of June and include a certain number of instructional days, professional development days and school holidays.

The Teaching Profession Act

17. The *Teaching Profession Act* was first enacted in 1944 (c.64), and brought into existence the Ontario Teachers' Federation ("the Federation"). Section 4 provides that every teacher is a member of the Federation; section 11 provides that Federation membership fees must be deducted from the salary of each teacher and remitted to the Federation by the board which employs the teacher. The Federation's Board of Governors consists of ten representatives from each of its five affiliates: The Ontario Secondary School Teachers' Federation, The Federation of Women Teachers' Associations of Ontario, The Ontario Public School Men Teachers' Federation, L'Association des Enseignants Franco-Ontariens, and The Ontario English Catholic Teachers' Association. The affiliates are the teacher organization which were already in existence when the Federation was created in 1944. The Board of Governors elects the executive of the Federation. It is also empowered to make regulations with respect to various matters, including the fees to be paid by members of the federation. Bylaws of the Federation require that each statutory member be a member of an affiliate, and the fee payable to the Federation depends on the affiliate to which the member belongs: see *Bowley v Ontario Teachers' Federation et al.*, [1971] 3 O.R. 69 (Ont. H.C.).

18. Paragraph 1(h) of the 1944 Act defined "teacher" this way:

"teacher" shall mean a person who is legally qualified to teach in a public school, separate school, continuation school, high school, collegiate institute or vocational school and is under contract to teach in such a school but shall not include an inspector, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month.

That definition remained unchanged until 1967, when it was amended (by c. 100, s. 1) to read:

“teacher” means a person who is legally qualified to teach in an elementary or secondary school and is under contract in accordance with Parts II and III of *The Schools Administration Act* but does not include an inspector, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month.

This definition remained unchanged until the 1980 revisions of the statutes of Ontario, when it was recognized that Parts II and III of the *Schools Administration Act* were replaced by Part IX of *The Education Act* in 1974. As a result, section 1(i) of the *Teaching Profession Act* now provides:

1. In this Act,

(i) “teacher” means a person who is legally qualified to teach in an elementary or secondary school and is under contract in accordance with Part IX of the *Education Act* but does not include a supervisory officer, and instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month.

The Labour Relations Act

19. The first provincial collective bargaining legislation in Ontario was applicable to employees of school boards only if the affected municipality elected by by-law to be covered by the legislation: *The Collective Bargaining Act*, 1943, c. 4, s. 24(e); *The Labour Relations Act*, 1944, c. 79, s. 10(d), and *The Labour Relations Act*, 1948, c. 51, s. 9(e). When *The Labour Relations Act*, 1950 (c.34) was enacted, school board employees generally came under the Act, although until 1966 any school board could declare that the Act would not apply to its relations with all or any of its employees. This did not apply to “teachers”, however, who were excluded from the operation of the Act by section 2(e) which read as follows:

This Act does not apply,

(e) to any teacher as defined in *The Teaching Profession Act*.

This provision remained unchanged (apart from a change from “any teacher” to “a teacher” in the 1960 revisions) until Bill 100 was enacted, when *The Labour Relations Act* was amended to provide as section 2(f) now does:

2. This Act does not apply,

(f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.

School Boards and Teachers Collective Negotiations Act: “Bill 100”.

20. The *School Boards and Teachers Collective Negotiations Act* was enacted in July of 1975. Before its enactment, no special or general legislation regulated collective bargaining between teachers and school boards in Ontario. Collective bargaining did, however, take place

between them (see J. Douglas Muir, *Collective Bargaining by Canadian Public School Teachers*, Task Force on Labour Relations Study No. 21 (Ottawa: Information Canada, 1968); Bryan M. Downie, *Collective Bargaining and Conflict Resolution in Education: The Evolution of Public Policy in Ontario* (Industrial Relations Centre, Queens University, Kingston, Canada, 1978); and Peter Hennessy, *Schools In Jeopardy: Collective Bargaining in Education*, (McClelland and Stewart, Toronto, 1979)). In October, 1970, the Ontario government established a committee of inquiry whose terms of reference were to inquire into, report upon and make recommendations with respect to the process of negotiation between teachers and school boards, including, *inter alia*, the definition of bargaining units. The committee formally known as The Committee of Inquiry Into Negotiation Procedures Concerning Elementary and Secondary Schools of Ontario was chaired by Judge Reville and will be referred to here as the Reville Committee. It prepared a report dated June, 1972 entitled "Professional Consultation and the Determination of Compensation for Ontario Teachers" in which it reviewed the matters referred to for inquiry and set out its recommendations. The committee's recommendation with respect to bargaining unit scope was that the bargaining agent should represent all employees of a board who hold a teaching certificate, except supervisory officers of the school board. The Ontario Teachers' Federation, which took the position that it should be the statutory bargaining agent for teachers, responded to that recommendation this way:

The Federation feels that the Committee's recommendation is not precise enough. For example, the Federation does not feel a responsibility to negotiate the salary of an employee of a board who holds a teaching certificate which is not a prerequisite under the Schools Acts and Regulation for employment — for example, a clerical worker with teacher qualifications who works in a school board's office.

The Federation recommends that the members of a teacher negotiating entity shall include those persons coming under the definition of "teacher" in the Teaching Profession Act . . . (*Submission to the Minister of Education in Response to the Report of the Committee of Inquiry into Negotiations Procedures*, Ontario Teachers' Federation, June, 1972, p. 6.)

Very few of the Reville Committee's recommendations were implemented in Bill 100. The definition of "teacher" ultimately adopted in Bill 100 incorporates all of the elements of the definition of that term in the *Teaching Profession Act* and adds for good measure the stipulation that the employee be employed "as a teacher". Whether that approach achieved precision might now be a matter of debate.

21. The scheme adopted in Bill 100 was that each teacher employed by a board would be represented by an organization called a "branch affiliate" consisting of all the teachers employed by a board who are members of the same "affiliate". (s. 1(a)). Each of the five affiliates of the Federation is an "affiliate". Paragraph 1(m) defines teacher this way:

(m) "teacher" means a person,

- (i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,
- (ii) who holds a letter of standing granted by the Minister under the *Education Act*,

(iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month;

The Act applies to all “teachers”:

3.-(1) This Act applies to all collective negotiations between boards and teachers in respect of any term or condition of employment put forward by either party for the purpose of making or renewing an agreement.

5. A branch affiliate shall, in negotiations and procedures under this Act, represent all the teachers composing its membership.

It also applies to principals and vice-principals, who are members of the bargaining unit, although they are not permitted to strike:

64.-(1) A principal and a vice-principal shall be members of a branch affiliate.

(2) Notwithstanding subsection (1), in the event of a strike by the members of a branch affiliate each principal and vice-principal who is a member of the branch affiliate shall remain on duty during the strike or any related lock-out or state of lock-out or closing of a school or schools.

The Act contemplates the continued significance of the individual contract of employment between the board and a teacher:

54.-(1) An agreement between a board and a branch affiliate shall be deemed to form part of the contract of employment between the board and each teacher who is a member of the branch affiliate.

(2) Where a conflict appears between a provision of any other part of a contract of employment and a provision of the agreement referred to in subsection (1), the provision of the agreement prevails, but no agreement shall conflict with the form of contract prescribed by the regulations under the *Education Act*.

22. The approach to collective bargaining adopted in Bill 100 differs in a number of respects from the approach of the *Labour Relations Act*. There is no provision for certification of bargaining agents or determination of the appropriate bargaining unit; both the bargaining agent and the scope of the bargaining unit are fixed by Bill 100. The parties are not free to determine the commencement and expiry dates of their collective agreement; under Bill 100, collective agreements must become effective on the 1st day of September and expire only on the 31st day of August in a subsequent year. To be effective, notice to bargain must be given in the month of January in the year in which the agreement expires, considerably earlier than

would be the case under the *Labour Relations Act*. Bill 100 provides for fact finding, rather than conciliation, as the third party intervention prerequisite to the resort to the sanctions of strike and lockout. In addition to fact finding, section 63 of Bill 100 prescribes a number of other prerequisites to strike or lock-out activity beyond those found in the *Labour Relations Act*, including a vote on the Board's final offer and a strike vote, with both votes conducted under the supervision of the Education Relations Commission, as well as at least five days' written notice to the board of the date on which the strike will commence. Like the *Labour Relations Act*, Bill 100 imposes on each of the parties to collective bargaining the obligation to bargain in good faith and make every reasonable effort to make or renew an agreement. Jurisdiction to assess and enforce compliance with this obligation is assigned to the Education Relations Commission, which is also assigned a number of other duties which have no equivalent in the jurisdiction assigned to the Ontario Labour Relations Board under the *Labour Relations Act*. Bill 100 assigns to the Ontario Labour Relations Board jurisdiction over applications for a consent to prosecute alleged contraventions of the Act (subsection 77(6)), and applications for declarations and directions with respect to allegedly unlawful strikes and lockouts (section 67).

Jurisprudence

23. The meaning and interplay of these various statutory provisions have been the subject of court, Board and arbitration decisions which were referred to in argument by the parties. It will be useful to review that jurisprudence before examining the use made of it in argument in this case.

The "Pink Letter" Cases

24. One of the collective bargaining sanctions employed by the Ontario Teachers Federation affiliates, both before and since the enactment of Bill 100, is the "in-dispute" designation. A particular set of negotiations with a school board having broken down, the affiliate would write to all its members to inform them of the breakdown of negotiations and advise them that teaching positions at the school or in the program in dispute are "unacceptable", and that members who apply for or accept such positions will receive no support in contractual or professional matters until the executive declares the member entitled to once again receive support. Some affiliates wrote these letters on grey paper; OSSTF's letters were and are on pink paper. The use of the "pink letter" sanction has been the subject of three decisions of this Board since the enactment of Bill 100: *The Board of Education for the City of Windsor*, [1978] OLRB Rep. July 699 ("the Windsor Board case"); *The Ottawa Board of Education*, [1983] OLRB Rep. May 694 ("the Ottawa Board case"); and, *The Board of Education for the Borough of Scarborough*, [1983] OLRB Rep. Nov. 1889 ("the Scarborough Board case"). In each case the school board was or had been party to a collective agreement made under Bill 100 with a respondent branch affiliate of OSSTF. In bargaining for the renewal of that agreement, the branch affiliate had been unsuccessful in its attempt to have new terms dealing with summer school and night school employment included in the renewal agreement. In each case the school board had taken the position that employment in summer school and night school programs was not covered by Bill 100, and was not a mandatory subject of bargaining. The branch affiliate then arranged a "pink letter" sanction directed at the school board's next summer school program, and in each case that action successfully provoked concerted teacher resignations from, and withdrawals of and refusals to make applications for, employment in the target program, with the result that the program was substantially disrupted. In each case the school board took the position that these actions were unlawful; as part of their defence,

the OSSTF and other respondents echoed the applicant school boards' assertions that summer school employment is not part of the subject matter of Bill 100.

25. In the *Windsor Board* case, the sanction employed by the respondents was not initiated by the usual form of pink letter, but by a resolution in the following form:

"Whereas District 1 OSSTF is suggesting that Summer School and Night School teaching be included in any new contract as an integral part of the school system and teaching load, *Be it Resolved* that members of District 1 OSSTF not teach Summer School for the Windsor Board of Education in 1978 and that District 1 encourage Elementary School Teachers, members of OECTA at the secondary level, and members of District 34 OSSTF to support the motion by not applying for these positions".

At the time this resolution was passed, the school board was seeking applicants for teaching positions in the summer school referred to in the resolution. Based on past years' experience, the school board would have expected applications from members of the respondent and from the other groups referred to in the resolution. The resolution was widely circulated and accomplished the intended result. Of those few who did apply for summer teaching positions, most withdrew their application when offered employment. The Board was unable to staff its planned summer school, and the lack of available applicants was found to be the result of concerted activity prompted by the respondents' resolution.

26. In the *Windsor Board* case, the applicant school Board claimed the respondents had violated Bill 100, and asked for a declaration of unlawful strike. "Strike" is defined in paragraph 1(1) of Bill 100:

(1) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed to curtail, restrict, limit or interfere with the operation or functioning of a school program or school programs or of a school or schools including, without limiting the foregoing,

(i) withdrawal of services,

(ii) work to rule,

(iii) the giving of notice to terminate contracts of employment;

Section 63 begins with these words:

63. No teacher shall take part in a strike against the board that employs the teacher unless, . . .

and then the section goes on to list six strike prerequisites. Subsection 65(1) prohibits the Federation, affiliates and branch affiliates from calling an "unlawful strike". Subsection 67(1) provides:

67.-(1) Where the Federation, an affiliate or a branch affiliate calls or authorizes a strike or teachers take part in a strike against a board that the

board, a member association, the Council or any person normally resident within the jurisdiction of the board alleges is unlawful, the board, member association, Council or person may apply to the Ontario Labour Relations Board for a declaration that the strike is unlawful, and the Board may make the declaration.

27. Because of the extent to which subsequent decisions rely on it, the Board's legal analysis in the *Windsor Board* case is set out here in full:

12. It is necessary to set out, at this stage, the relationship existing between the *Windsor Board* and those teachers who are members of District 1 O.S.S.T.F. Critical segments of this relationship are statutorily imposed, starting with the individual teacher's contract of employment which must be in the form prescribed by regulations made under *The Education Act, 1974*. This form of contract recites its commencement date and is for an indefinite term and provides the contract may be terminated by mutual consent, or on December 31st or August 31st of any year subject to prescribed notice periods.

13. The contract of employment also provides, inter alia, for the payment of an annual salary in not less than ten installments (in which case a payment must be made "on or before the last teaching day of each month): if annual salary is made [sic] in more than ten installments any unpaid balance becomes payable on or before the last teaching day in June". *The School Boards and Teachers Collective Negotiations Act, 1975* provides in section 55 [now §4] that the collective bargaining agreement applicable to a school where the teacher is employed is imported into and forms part of the contract but no such collective agreement "shall conflict with the form of contract prescribed".

14. *It is clear to me that the contract does not envisage teaching duties other than during the regular school year* which is defined by regulations under the Education Act as commencing "on the day following Labour Day and end on the 30th day of June." and "shall include at least 185 instructional days". *Neither the Windsor Board nor the respondent union argue that the projected teaching at summer school would be covered by this employment contract* and in fact in a document prepared by the Windsor Board and filed with us the statement is made:

"All these teachers are not employed under a contract prescribed by the Ministry of Education. The practice of the Board is to hire them on an hourly basis without any benefits or other working conditions such as tenure, P.T.R., class size etc. that are provided for in this agreement. In addition, there is no obligation on the Board's part to continue employing these teachers".

15. It therefore becomes clear that the question that we are dealing with here does not relate to any obligations or responsibilities which arise out of the individual employment contract or of the collective agreement. The issue is whether such persons have the right, in concert, to refuse to offer

to enter into a new employment relationship with the same employer with different remuneration practices and working conditions.

16. A logical extension of this position would result in any person employed under a statutory contract with any Board of Education in the Province to whom notice had come of the Windsor Board's solicitation of applications for summer school to be similarly caught by the proscription against concerted activity. Such a result would represent a broadening of more normal definitions of "strike" to include persons not in the employ of the employer. The definition of "strike" in section 1(1) of the Act is indeed a very wide one and the Windsor Board would argue that the persons with whom we are here involved are teachers as defined by section 1(m) and that the refusal to make application for summer school employment as well as the withdrawal of an application made fall within "any action or activity by teachers . . . in concert . . . designed to . . . interfere with the operation of functioning of a school program . . . or of a school". *The respondent union takes the position that we must look to the fact that a summer school teacher is not a "teacher" as defined by section 1(m), is not covered by The School Boards and Teachers Collective Negotiations Act, 1975 and therefore this activity is not proscribed by section 66 of the Act.*

17. If we look to the general scheme of the Act there is no doubt that it is intended to regulate collective bargaining on behalf of persons who are employed under a contract prescribed by the Ministry of Education and to further harmonious relations between School Boards and teachers by "providing for the making and renewing of agreements and by providing for the relations between boards and teachers in respect of agreements". To that end a statutory framework is provided within which bargaining agents are designated, structuring of negotiation formats (including Fact Finding, Voluntary Binding Arbitration, Final Offer Selection) and a defining of the final resort by both parties to the application of economic sanctions in order to conclude an agreement. *Nowhere, in the Act, do we find any reference to summer school programs (which is not a mandatory activity of a Board of Education but in the same order as evening classes and special education programs under section 147 [now 149] of The Education Act) and the whole scheme of the Act is to focus on relations between teachers and school Boards during the course of the regular school year (as defined by The Education Act).*

18. Under such circumstances can we conclude that "school program" and "schools" as the terms are used in section 1(1) relate to school programs and schools outside the ambit of the general subject matter of the statute? We think not. Where the Legislature throughout the statute has directed itself solely to collective bargaining facets concerned with teachers and Boards integral to the regular school year it would in our view, in the absence of explicit language, be wrong to consider that the Legislature in this one section of the Act (Section 1(1)) intended to refer to school programs or schools other than those to which the Act in general applies. This conclusion, we believe, is fortified when one looks to the enumerated activities in section 1(1) which are to fall within the general definition. These are:

- (i) withdrawal of services,
- (ii) work to rule,
- (iii) the giving of notice to terminate contracts of employment:

The one common denominator running through the above enumerated activities is that they all envisage a disruption of the employer's operations by employees in some manner restricting their services which are required in their normal employment relationship, i.e. during the regular school year. There is no such factor involved here but rather it is a refusal by District 1 members who have a separate employment relationship with the Windsor Board, not relevant to summer school to take on an employee status by entering into a separate and new employment relationship outside of the regular school year. The evidence establishes that the Windsor Board is not obligated to draw its summer school staff from this group and would be prepared to staff this program with persons who have never had any relationship with the Windsor Board. We see no obligation on such persons to not concertedly refuse to make application for employment and we can see no higher obligation, in these circumstances, fastening on members of District 1.

19. For these reasons I have found that the complained of activities do not constitute a strike within the meaning of section 1(1) of the Act and that there is therefore no breach of section 66(1)(2) of the Act.

20. The application is dismissed.

(emphasis added)

28. It should be noted that both the school board and the trade union agreed that persons teaching in the summer school program in question would not be entitled to a contract in the form prescribed by regulation under the *Education Act* (see paragraphs 14 and 16 of the decision). While there is some discussion of the definition of "strike" and of the six conditions precedent to a lawful strike, there is no express reference to the portion of section 63 reproduced above. Since only section 63 proscribes strikes, and it makes teacher participation in a "strike" as defined by paragraph 1(1) "unlawful" only if the strike is directed at the teacher's own employer board, it is difficult to understand the basis of the "logical extension" referred to in paragraph 16 of the Board's decision.

29. With respect to the emphasized portion of paragraph 17 of the Board's decision, it is noteworthy that no reference is made to an earlier decision of the Board in *Board of Education for the Borough of Etobicoke* (discussed *infra* at paragraph 34) and particularly paragraph 15 of that decision, which quite clearly contemplated that a person engaged in activities other than the so-called "mandatory" activities of a school board could and should be considered a teacher within the meaning of section 1(m) of Bill 100. The Board's conclusion that Bill 100 focuses exclusively on school board/teacher relations during the regular school year seems to be based exclusively on the Board's earlier conclusion that the statutory contract referred to in the definition of "teacher" does not envisage teaching other than during the regular school year. In considering the broad definition of "strike", the Board in paragraph 18 took interpretive

guidance from the nature of the activities specifically enumerated in section 1(1). The conclusion then drawn in the sentence we have emphasized in our quotation of that paragraph is one which could as easily have been drawn without the added reference to the regular school year and by substituting the word “existing” where “normal” was used in that sentence. Such an approach might have been reinforced by reference to paragraph 68(5)(a) and section 70 of Bill 100.

30. The subject matter of the *Ottawa Board* case was an application by the Ottawa Board of Education for a declaration of unlawful strike, made under section 67 of Bill 100 and, alternatively, under section 92 of the *Labour Relations Act*. In that case, the respondent branch affiliates had attempted to have certain terms and conditions of employment of teachers employed in the school board’s continuing education program (summer school and night school) included in their collective agreements under Bill 100. One of the major concerns of the branch affiliates was the number of students enrolled in the day school program who were enrolling in night school. The school board’s position was that the terms and conditions of the teachers employed in summer school and night school were not the proper subject matter of collective bargaining under Bill 100. When the school board refused to abandon or modify that position, OSSTF and AEFO each issued a “pink letter” at the request of the respondent branch affiliates. The respondents admitted that their pink letters and others of their actions had deterred their members from applying for employment in the applicant’s summer school and night school programs, and that those deterred included teachers employed by the applicant under written contract in its regular day school program. As a result, the school board had been unable to adequately staff its 1983 summer school. The school board argued that while a summer school program would not ordinarily be regarded as a “school program” within the meaning of paragraph 1(1) of Bill 100, its particular summer school program was such a “school program” because the employment of teachers in that program had been addressed in its collective agreement in a provision reproduced in paragraph 21 of the Board’s decision. It sought to distinguish on that basis the decision in the *Windsor Board* case, where the lapsed collective agreement made no reference to the teaching of summer school. It argued that the concerted refusal to teach in the continuing education programme was a concerted refusal to accept a work assignment and was as much a strike as would be a concerted refusal to work overtime, even where overtime is voluntary under a collective agreement. In the alternative, it argued that a teacher employed in its continuing education programme was not a “teacher” within the meaning of section 1(m) and would not, therefore, fall within the exclusion contemplated by paragraph 2(f) of the *Labour Relations Act*; accordingly, the school board’s relations with such employees would be governed by the provisions of the *Labour Relations Act*. The school board argued that the concerted refusal to apply for positions in the continuing education program was, again, a concerted refusal to accept a work assignment analogous with a concerted refusal to work voluntary overtime, and constituted a strike within the meaning of the *Labour Relations Act* which was unlawful because the timeliness of that Act had not been met. The respondents relied upon the decision in the *Windsor Board* case; they argued that Bill 100 regulated relations between teachers and school boards only in respect of “regular day courses taught during the regular school year”, and that concerted activity in relation to other school programs could not constitute a “strike” within the meaning of Bill 100. With respect to the application of the *Labour Relations Act*, the respondents’ argument was that the concerted activity in question was by persons who had not entered into employment governed by the *Labour Relations Act* and, accordingly, could not be considered “employees” capable of engaging in an unlawful strike as that term is defined by that Act.

31. In its decision in the *Ottawa Board* case, the Board cited with approval the Board's earlier decision in the *Windsor Board* case, adopted the proposition that those programs which do not form part of the regular school year are not school programs or schools within the meaning of section 1(1) of Bill 100, and concluded that a concerted decision by teachers to interfere with the operation of such programs could not be a strike within the meaning of that Act. The Board doubted that parties to a bargaining relationship governed by Bill 100 could enlarge the scope of that Act's application merely by addressing the staffing of programs which do not form part of the regular school year. Even if they could, the Board said, that could only be accomplished if the collective agreement provisions in question created an obligation on the part of teachers to staff the program in question. The Board concluded that the provision relied upon by the school board did not create such an obligation. With respect to the application of the *Labour Relations Act*, the Board concluded that the respondent teachers were not employees of the applicant school board in respect of its continuing education program within the meaning of section 1(1)(o) of the *Labour Relations Act* at the time of their concerted refusal to apply for teaching position in that program. It might have been otherwise, the Board noted, if the teachers were obliged to do this work by the terms of their existing employment relationship with the school board. However, the Board found that the collective agreement provision relied upon by the school board did not create an express obligation to staff the continuing education program, nor did it create an implied obligation such as exists in respect of overtime work within a bargaining unit.

32. Similar issues came before the Board again in the *Scarborough Board* case. The respondent branch affiliate of OSSTF had issued a "pink letter" with respect to the applicant's summer school program; it had also engaged in other activities designed to persuade teachers not to apply for or accept employment in that programme and, further, to resign any employment they might already have accepted. Before actual teaching in the summer school commenced, a number of persons purported to resign from appointments they had previously accepted as summer school principals, vice-principals and curriculum resource teachers. The complainant school board applied to this Board under sections 89 and 92 of the *Labour Relations Act*, claiming that OSSTF and its branch affiliate had counselled, and the persons who had thus resigned had engaged in, an unlawful strike within the meaning of that Act. The parties, and the Board, took it as axiomatic that Bill 100 had no application to the applicant's summer school program or to any concerted activity directed at it:

5. . . . The *School Boards and Teachers Collective Negotiations Act* does not apply to the employer's summer programmes, or to the employment relationships of teachers engaged to teach or administer those programmes. In consequence (and by default), these relationships fall within the purview of the *Ontario Labour Relations Act*. (See: *Board of Education for the City of Windsor*, [1978] OLRB Rep. July 699, and *Ottawa Board of Education*, [1983] OLRB Rep. May 694.)

6. The parties do not dispute that the employment relationships in the Scarborough Board's summer programme are governed by the *Labour Relations Act*. They agree that the *Labour Relations Act* applies. They disagree about whether the named respondents, or any of them, have engaged in conduct which would be considered unlawful under that Act.

7. The fact that the Scarborough Board's summer school programmes are not governed by the *School Boards and Teachers Collective Negotia-*

tions Act does not mean that they are of no concern to the teachers employed by the Scarborough Board. On the contrary, in these days of declining student enrollment, economic uncertainty, and income restraint, the Scarborough teachers have a real interest in the work opportunities available during the summer. Over the years, District 16 has tried to negotiate preferred access to these jobs as well as a level of remuneration equivalent to what its members would be paid under the terms of the collective agreement. Since many of the credit courses offered during the summer are the same as those offered in the fall and winter terms, the Scarborough teachers' position is that they should have at least a right of first refusal in respect of these work opportunities, and that when they are employed during the summer they should be paid at a rate equivalent to what they earn when performing similar duties during the regular school year. In order to preserve its flexibility, the Scarborough Board has traditionally rejected both demands.

As in the earlier cases, the Board in the *Scarborough Board* case found that the pink letter and other related activities had had the intended effect, and that the individual respondents had resigned in concert as a result of those activities. On behalf of those individual respondents, it was argued that they were not "employees" in relation to the summer school program because that program had not yet begun when they "resigned". The Board rejected that argument, noting that appointments had been made and accepted and that, indeed, the individual respondents had engaged in some minor administrative duties in relation to the summer program prior to their attempts to resign. The Board concluded that the individual respondents were employees within the meaning of paragraph 1(1)(o) of the *Labour Relations Act*, a finding which depended, at least in part, on an agreement of the parties noted in paragraph 4 of the Board's decision:

4. The Board notes the agreement of the parties that, for the purposes of this proceeding, the principals, vice-principals and curriculum resource teachers are "employees" within the meaning of the *Labour Relations Act*. We record this stipulation because, having heard the evidence, there is an argument to be made that the principals and vice-principals exercise "managerial functions" within the meaning of section 1(3)(b) of the Act — whatever their status may be under the *School Boards and Teachers Collective Negotiations Act*.

Of course, if principals and vice-principals were acknowledged to exercise "managerial functions" within the meaning of paragraph 1(3)(b) the *Labour Relations Act*, then they would not be "employees" whose concerted activity could be unlawful under the *Labour Relations Act*.

33. In the *Ottawa Board* case, OSSTF and the applicant school board had both agreed that OSSTF was a "trade union" within the meaning of the *Labour Relations Act*. In the *Scarborough Board* case, OSSTF maintained it was not a trade union, while the applicant school board claimed that it was. That issue was dealt with at paragraph 48 of the Board's decision:

48. It is said that the OSSTF is not a trade union and that, therefore, the actions of its officers, officials or agents cannot occasion liability under

section 74 of the Act. Having examined the constitution and bylaws of the OSSTF, as well as the collective bargaining role which it plays and which is recognized in the *School Boards and Teachers Collective Negotiations Act*, we find that the OSSTF meets the definition of trade union found in section 1(1)(p) of the *Labour Relations Act*.

If OSSTF has not been found to be a trade union, it could not have been subject to the restraints of the *Labour Relations Act*, nor could those of its officers who had not accepted employment in the school board's summer school program.

Other OLRB Decisions

34. The "pink letter" cases did not involve any dispute over the meaning of "teacher" in Bill 100. The parties in each of those cases agreed that Bill 100 did not apply to teachers in summer schools. In its earlier decision in *Board of Education for the Borough of Etobicoke* [1977] OLRB Rep. July 415 ("the *Etobicoke Board* case") the Board had been faced with a contest over the meaning of teacher in paragraph 2(f) of the *Labour Relations Act* and, hence, in paragraph 1(m) of Bill 100. In that case, the applicant trade union had been certified under the *Labour Relations Act* as exclusive bargaining agent for persons employed by the respondent school board in job classifications including "physiologists and attendance councillors". The *Education Act* permits the employment of persons in those job classifications, and does not require that the incumbents be qualified teachers. A physiologist and six attendance councillors employed by the respondent board were, nevertheless, qualified teachers. The Board was obliged to consider whether these persons were excluded from the application of the *Labour Relations Act* by reason of the provisions of section 2(f) of that Act. Because the persons in question did not teach in a classroom, argument focused on the extent to which the words "as a teacher" in section 1(m) modified what is otherwise substantially the definition of "teacher" in the *Teaching Profession Act* so as to require a teacher within the meaning of that Act to be teaching in the classroom before being considered a teacher within the meaning of section 1(m) of Bill 100. In that connection, the Board observed:

15. An interpretation of "teacher" in section 1(m) which extends beyond requiring the persons to be teaching in the classroom is supported as well by the overall scheme of *The Education Act*, 1974 which provides for both the exclusive and partial assignment of non-classroom teaching duties to teachers in their capacity as "teachers" under the Act. Paragraph 2 of section 147(1) provides that the board may determine the terms upon which teachers are to be employed and may prescribe their duties. The Act does not restrict the school board to using a teacher to teach in the classroom. Paragraph 27 of section 147(1), for example, specifically enables the board to appoint teachers so qualified to positions as guidance counsellors. Paragraphs 37 and 38 of section 147(1) permit the Board to employ and pay teachers to educate children in charitable organizations and detention homes. While some of the duties so performed would correspond to classroom teaching duties, the terms of the section are broad enough to encompass educational responsibilities beyond the classroom. *The Education Act*, 1974 further provides for the appointment of teachers to the School Board Advisory Board (section 175), for their assignment to school ground duty (section 229(1)(e)) and for their participation in professional activity days (section 229(1)(h)).

Turning to an analysis of Bill 100 (referred to in the decision as “the S.B.T.C.N. Act”) the Board described the appropriate approach to interpretation of that Act.

18. The nature of the S.B.T.C.N. Act suggests to the Board that predictability of one’s status under the *S.B.T.C.N. Act* as either a teacher or a non-teacher is more inclined to promote a stable relationship between school boards and teachers than continual uncertainty dependent on a particular assignment under the teacher’s contracts. Given the scheme of The Education Act 1974 coupled with *The Metropolitan Separate School Board* decision, sliding in and out of the scope and dictates of the *S.B.T.C.N. Act* would be a constant possibility if the definition of “teacher” under the *S.B.T.C.N. Act* required the person to be teaching in the classroom as suggested by the applicant.

19. Under the *S.B.T.C.N. Act* those persons who fall within the category of “teacher” form a statutory bargaining unit. Given the ambiguous wording of the section 1(m) definition of teacher it is reasonable to assume that the intention of the legislature was to import into the delineation of the teachers’ bargaining units the longstanding concern of this and other labour tribunals to minimize fragmentation by structuring viable bargaining units based on a broad community of interests. (See for example *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7.) The process of definition involves a balancing of these two countervailing concerns. While too diverse a unit may put heavy strains upon the bargaining process, too narrow a unit may cause undue fragmentation resulting in a less effective presence at the bargaining table.

20. In light of these principles the Board is persuaded that the definition of “teacher” in section 1(m) incorporates those qualified teachers employed under a contract with the board who perform duties within the teaching programme in the broad sense. It is this interpretation which would reflect a legislative scheme which strikes an optimal balance between the concerns of community of interest, on the one hand, and undue fragmentation, on the other. The group so defined would insure a community of interests in that all would be performing interrelated jobs each aimed at furthering the education of students. It would further avoid undue fragmentation in that it would include teachers performing duties both inside and outside the classroom.

21. Both of the alternate definitions cause a problem in the balancing of these two labour relations concerns. The requirement that qualified teachers be teaching in the classroom insure a group with a strong community of interests but it raises the possibility of fragmentation. Those teachers who are excluded from the unit by this requirement would have to bargain in smaller units which might not be viable and which might not represent their interests as qualified teachers employed under a teacher’s contract. On the other hand, a definition without a functional requirement avoids the possibility of fragmentation but it jeopardizes the strength of the group’s community of interest in that it may include people whose jobs are unrelated to the teaching programme.

24. We find, therefore, that the phrase ‘as a teacher’ in the section 1(m) definition of teacher contained in the *S.B.T.C.N. Act* describes the type of work performed by the teacher rather than the type of contract. We interpret “as a teacher” broadly and find that it includes those duties that fall within a broadly defined teaching programme. The section 1(m) definition, therefore, contains three criteria: proper qualifications, the proper form of contract and the performance of duties within the teaching programme.

25. By the agreement of the parties all seven persons in question are properly qualified and are employed under the proper form of teacher’s contract. Accordingly they meet two of the three criteria. Do they also meet the third criterion; do they function sufficiently “as a teacher?” To the extent that the attendance counsellors and psychologists help to bring students into the classroom and help them resolve problems that are impediments to learning, they are a vital part of the teaching programme. Having regard to the evidence respecting their duties we are satisfied that the duties of the attendance counsellors and psychologists are intrinsic to the teaching programme and that they are, therefore, teachers within the meaning of section 1(m) of the *S.B.T.C.N. Act*.

35. Bill 100 was considered again by this Board in *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Mar. 466, which dealt with an application under the *Labour Relations Act* by the Ontario Public Service Employees Union for certification with respect to a unit of persons employed by the respondent school board as “occasional teachers” within the meaning of the Education Act. In paragraph 3 of its decision, the Board set out section 2(f) of the *Labour Relations Act* and section 1(m) of Bill 100 and continued:

The making of a written “contract of employment” of the type referred to in that provision is a mandatory requirement in respect of every “full-time or part-time teacher who is employed by a board [of education] and who is not an occasional teacher”: see section 230 of the *Education Act*, R.S.O. 1980, c. 129. It is this statutory requirement which has given rise to the jargon by which teachers bound by such a contract are referred to as “contract” teachers and teachers not bound by such a contract are referred to as “non-contract” teachers.

4. The Board’s jurisdiction over the “occasional teachers” for whom the applicant seeks bargaining rights was not disputed by any of the parties. Having raised that matter with the parties and considered their submissions, the Board is satisfied that it has jurisdiction in this matter since the “occasional teachers” whom the applicant seeks to represent are not “contract” teachers. Thus, they are not “teachers” as defined in the *School Boards and Teachers Collective Negotiations Act*, and are not excluded from the coverage of the *Labour Relations Act* by section 2(f) (or any other provision) of the *Labour Relations Act*.

The Board went on to consider the structure of an appropriate bargaining unit or units of occasional teachers, a matter with which we are not concerned here.

Other Jurisprudence

36. In *Ontario Teachers Federation v. Metropolitan Separate School Board*, (1976) 13 O.R. (2d) 499, the Ontario Court of Appeal considered the definition of “teacher” in section 1(i) of the *Teaching Profession Act*, and the deemed contract provisions of subsection 16(1) of *The Schools Administration Act*, R.S.O. 1970 c. 424. In that case, the defendant school board had classified as “co-ordinators” certain of its employees who were legally qualified to teach. Each co-ordinator agreed that no permanent teacher’s contract would be entered into with the Board. The school board did not deduct from their salary and remit to the Ontario Teachers Federation the fees referred to in section 11 of the *Teaching Profession Act* and in regulations thereunder. The Federation claimed that fees for these coordinators had been wrongfully withheld from it. The Board’s obligation to pay these fees to the Federation turned on whether a co-ordinator was a “teacher” within the meaning of section 1(i) of the *Teaching Profession Act*. At page 501 of the majority decision, Mr. Justice Dubin said:

It is to be observed that the *Teaching Profession Act* is a mandatory scheme, the broad purpose of which is to promote and advance the cause of education and the interest of teachers. The relevant parts of the *Schools Administration Act* provide great job security for members of the teaching profession. The relevant statutes and Regulations, with great specificity, detail the statutory authority and duties of school boards as well as regulate the relationship of the boards to their employees. The same statutes and Regulations in turn detail the various classifications of teachers in this Province. There is no classification of “co-ordinators” provided for in any of these statutes or Regulations although there are classifications which are similar.

After rejecting arguments that the terms of the co-ordinators’ employment were repugnant to the statutory contract because the co-ordinators had no teaching duties and worked on a twelve month basis, Mr. Justice Dubin continued (at page 502):

I have considerable doubt as to the authority of the board to make the classification of “co-ordinators” at all, but this is not before us. However, in my opinion, neither the school board nor a teacher can evade the mandatory provisions of the *Teaching Profession Act* and the *Schools Administration Act* by assigning to a teacher who was legally qualified to teach in an elementary or secondary school a job classification within the teaching programme of the board not provided for by the relevant statutes or Regulations, and agreeing not to enter into a Permanent Teacher’s Contract. It was the duty of the board to enter into a permanent teacher’s contract with the teacher, and, in the absence of its doing so, I read s.16(1) of the *School Administration Act* to deem that such a contract had been entered into for the purposes of the *Teaching Profession Act*. Since the “co-ordinators” did not fall within any exemption, they are subject to the *Teaching Profession Act*.

37. As might be expected, the parties to this application referred in argument to the reasons set out in the Kennedy award, which found that the employees affected by this certification application were not covered by the existing collective agreement between the respondent and OSSTF District 16, because, in the opinion of the majority of that arbitration board, those employees are not teachers within the meaning of section 1(m) of Bill 100. The majority adopted and embellished the reasoning in the *Windsor Board* decision. After referring to that and the subsequent decision in the *Ottawa Board* case, they said:

The reference in both of the foregoing decisions restricting the scope of the School Boards and Teachers Collective Negotiations Act to activities being conducted during the regular school year rests on the analysis set out in paragraph 18 of the *City of Windsor* decision with respect to the legislative intent and ambit in defining the subject matter of the Statute. The particular concept of limiting it to the regular school year is not based on a reference to the regular school year as being contained within the Statute. The rationale of the cases focuses really on what are the normal and mandatory activities for a Board of Education and considers that it is only these which are encompassed within the Act. It is our view that where the previous decisions have referred to the regular school year they have done so not as a term of art but rather as a basis of differentiating why the particular program that is not to be included within the ambit of the Act differs from those activities which the Act was meant to encompass. In dealing with programs which are not normal or mandatory for a Board, the rationale of the cases is that those programs were meant to be included within the Act only to the extent that they were specifically covered. The particular programs which were excluded in the decisions related to night school and summer school activities and because they did not occur during the regular school year they were held not to come within the ambit of the Statute. It would be our view that the Humewood House program as described in the evidence is much more dissimilar to the normal activities of a Board of Education and within the rationale there is even more reason for excluding it from the ambit of the Act. The differences in structure and format of the Humewood House program from a regular day school are very significant. Its integration with a more comprehensive assistance program for the clients of Humewood House further distinguishes it from what would constitute a normal and usual program for a Board of Education. It would firmly be our view that if a night school or summer school program is not to be considered within the ambit intended for the School Boards and *Teachers Collective Bargaining Act* the substantive reasons for excluding a program such as the Humewood House program are even more compelling. In our view therefore the ratio in the decision in the *City of Windsor* case is not limited to the conclusion that to be outside the ambit of the *School Boards and Teachers Collective Negotiations Act* the program has to fall outside of the regular school year. We think rather that the focus is on the normal and mandatory activities of a Board of Education as governed by the *Education Act* and the particular reason why the night school and summer school programs fall outside that ambit was that they took place outside of the regular school year. For other non-mandatory and unusual activities entered into by a Board of Education they too can be considered as not coming within the intended ambit of the Act where there are significant differences in the substance of their operations which would require different and particular treatment. We believe that such differences do exist in the context of the Humewood House program.

It should be noted that the majority, based on a analysis of the language of the collective agreement in question, also found that the parties did not intend any of its provisions to apply to persons employed by the school board at Humewood House.

Is OSSTF as a “trade union”?

38. The respondent school board asks us to find that OSSTF is not a trade union within the meaning of paragraph 1(1)(p) of the *Labour Relations Act*. It asserts that principals and vice-principals, as those terms are defined in Bill 100 and in the *Education Act* and regulations thereunder, exercise managerial functions within the meaning of paragraph 1(3)(b) of the *Labour Relations Act*. It argues that this conclusion is compelled by the nature of the duties assigned to principals by section 236 of the *Education Act* and sections 12 and 13 of Regulation 262 under that Act, and particularly subsection 12(3) of that Regulation, which contains the following provisions:

- (3) In addition to the duties under the Act and those assigned by the board, the principal of a school shall,
 - (a) supervise the instruction in the school and advise and assist any teacher, in co-operation with the teacher in charge of the organizational unit or program in which the teacher teaches;
 - (b) assign duties to vice-principals and to teachers in charge of organizational units or programs;
 - (e) report to the board or to the supervisory officer in writing, on request, on the effectiveness of members of the teaching staff and give to a teacher referred to in any such report a copy of the portion of the report that refers to the teacher;
 - (f) recommend to the board,
 - (i) the appointment and promotion of teachers, and
 - (ii) the demotion or dismissal of a teacher whose work or attitude is unsatisfactory, but only after warning the teacher in writing, giving the teacher assistance and allowing the teacher a reasonable time to improve;

Vice-Principals are provided for in section 13 of Regulation 262, which provides:

- (1) A board may appoint one or more vice-principals for a school.
- (2) A vice-principal shall perform such duties as are assigned to the vice-principal by the principal.
- (3) In the absence of the principal of a school, a vice-principal, where a vice-principal has been appointed for the school, shall be in charge of the school and shall perform the duties of the principal.

In addition to the duties apparent from these statutory and regulatory provisions, the School Board alleges, and OSSTF concedes, that school principals are often members of the school board’s bargaining team when it engages in collective bargaining with non-teacher employees.

Counsel for the school board declined the opportunity to lead any other evidence with respect to the duties and responsibilities of principals and vice-principals.

39. In its argument the school board notes that principals and vice-principals are, by the terms of subsection 64(1) of Bill 100, included in the bargaining units represented by branch affiliates of OSSTF; principals and vice-principals are also “teachers” within the meaning of the *Teaching Profession Act*, and, hence, members of the appropriate affiliate by reason of their statutory membership in the Ontario Teachers Federation. The school board argues that this Board has always refused to recognize as a trade union any association which includes in its membership persons who exercise managerial functions. It cites for that proposition *Hydro Electric Power Commission of Ontario*, [1971] OLRB Rep. 501, *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 84, *Chrysler Canada Ltd.*, [1975] OLRB Rep. Nov. 852, *Armour Associates Ltd.*, [1976] OLRB Rep. Mar. 117, *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651 and *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. The school board argues, in the alternative, that OSSTF would not be a trade union even if principals and vice-principals were excluded from membership, because it includes in its membership teachers covered by Bill 100 who, being excluded from the scope of the *Labour Relations Act*, cannot be “employees” within the meaning of the *Labour Relations Act* and who, accordingly, are not appropriate to membership of an “organization of employees”. Indeed, counsel for the school board asks us to assume that OSSTF was originally formed by teachers not covered by the *Labour Relations Act*, and argues that an organization brought into existence by persons not covered by the *Labour Relations Act* cannot be a “trade union” within the meaning of that Act.

40. OSSTF relies on the matters recited in paragraph 48 of this Board’s decision in the *Ottawa Board* case, *supra*, when it there found that the applicant was a trade union within the meaning of the *Labour Relations Act*. It argues that the matters referred to by the school board do not compel the conclusion that principals and vice-principals exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act. Even if they did, the Board decisions cited by the respondent school board can all be distinguished, OSSTF argues, on the basis that none of the associations considered in those cases had, as OSSTF does, a statutory role in collective bargaining under another statute.

41. The respondent’s argument requires us to assess, as a matter of first impression, whether principals and vice-principals are “managerial” from the perspective of the *Labour Relations Act*; that is, whether pursuant to paragraph 1(3)(b) of that Act, persons exercising the duties and responsibilities of principals and vice-principals would be deemed not to be employees within the meaning of that Act. The Board’s approach to section 1(3)(b) is amply summarized in the following passages from *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84:

7. The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have “divided loyalties”. This purpose has been succinctly stated by

the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

“The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeking that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for ‘cause’ or passed over for promotion on the grounds of their ‘ability’. The employer does not want management’s identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm’s length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.”

8. . . . the *Labour Relations Act* itself does not contain a definition of the term “managerial functions”, nor are there any specified criteria to guide the Board in forming its opinion. The task of developing such criteria has fallen to the Board, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so-called “first line” managerial employees, an important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit. . . .

9. . . . the Board has extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker, to those who make what the Board has called “effective recommendations” which materially affect the conditions of employment of those supervised. [See: *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. April 261; and *Inglis Ltd.*, [1976] OLRB Rep. June 270; and for a contrary view of the effect of similar provisions in the *Canada Labour Code*, see; *British Columbia Telephone 76 CLLC* ¶16,015 at page 467]. In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or “input” is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising “managerial functions”. . . . On the other hand, there will also be situations where individuals make serious recommendations about the employment situation or security of fellow employees. If these recommendations, on the evidence, are usually acted upon to the possible detriment of those employees, then it can be said that the person making the recommendation is, if not the actual decision-maker, then one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic destiny of his co-workers. Such influence carries with it the potential for conflict to which section 1(3)(b) is directed. It remains a question of evidence whether an individual’s authority extends this far.

11. As collective bargaining extends to technical and professional employees (engineers, for example, were specifically included in the Act only in 1971), the Board had to deal with increasingly complex job hierarchies and reporting structures. In a professional context, the members of the bargaining unit are likely to be highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment and requiring little external direction in the performance of their regular duties. Such direction as is necessary will often be generated internally through group discussion, evaluation by peers, or “collegial” modes of decision-making; and one should not expect the managerial structure appropriate for professionals to be the same as that for manual workers. The technical or professional employee will have a special relationship with management,

with fellow professionals, and with the less skilled employees at lower levels on the job hierarchy.

An assessment of duties and responsibilities requires more than a list of assigned functions, as the Board observed in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379:

29. Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line that the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e. to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank of file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not of much assistance in determining what a person's functions really are.

After referring to the paragraph just quoted from the *Falconbridge* case, the Board in *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261 had this to say:

38. It is noteworthy that this test, so not to be overly exclusionary, requires that a person be *primarily* employed in the direction and supervision of employees and, as well, possess effective control or authority over those employees. Hence to the extent a person only incidentally supervises employees while working beside them (i.e., the lead hand, the working foreman — see *Fruehauf Trailer Company of Canada Limited*, [1974] OLRB Rep. April 254) or to the extent that a supervisor is a mere advisor, conduit, or co-ordinator without effective control over employees (for example, see *The Lakehead Board of Education* [1970] OLRB Rep. February 1,331 and *CUPE and Cochrane Nursing Home Limited* [1972] OLRB Rep. June 618) section 1(3)(b) has no application. The conduit or co-ordinative function of supervision is most prevalent in the white collar or quasi-

professional industries like those of health and social services. In these industries it can be said that through extensive formal education management objectives have been built into employees and supervisors perform co-ordinating and resource functions with little effective control or authority over individual employees; (see *Toronto East General and Orthopaedic Hospital, Inc.*, Board File No. 5681-74-R; *The Children's Aid Society of Huron County*, [1971] OLRB Rep. October 632; *The Burlington-Nelson Hospital*, [1971] OLRB Rep. January 2; *The Corporation of the City of Hamilton*, [1972] OLRB Rep. July 697; *Ajax and Pickering General Hospital*, [1970] OLRB Rep. February 1,283; and *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154). Just as important, these latter cases graphically reflect the Board's willingness to consider the intrinsic differences between industries.

39. But the "effective control" test has not been an easy concept to apply. When can it be said that one person exercises effective control over another? One who can discipline, discharge, transfer, promote, or demote another employee surely has such effective control. And with a similar certainty one who only incidentally supervises, instructs, reports, etc. does not. But between these extremes there is a vast penumbral area. In this shadowland a person may exercise only one or two managerial type functions or make recommendations that other decision-makers consider. Thus it is in this area that the Board has most often said it will look at the "totality" of the evidence in making its determination. . . .

42. Having regard to the principles elaborated in these authorities, we are satisfied that we could not assess whether principals are "managerial" from the perspective of the *Labour Relations Act* on the basis only of the laundry list of duties which may be found in the *Education Act* and Regulations thereunder. Few of the listed duties bear directly on the employment relationship between teachers and school boards. The duties and responsibilities of principals include the duties and responsibilities of teachers; the principals' additional duties speak, *inter alia*, to the coordination of effort among members of the teaching staff (see section 236(b) of the *Education Act* and paragraph 12(3)(a) of Regulation 262 thereunder). Many of the principals' additional duties are concerned with the school board's property rather than with its employees. The principal's reporting and recommending responsibilities under paragraphs 12(3)(e) and (f) of Regulation 262 are subject to subsection 12(5) of that Regulation, which requires that the principals' reports and recommendations be transmitted to the school board "through the appropriate supervisory officer." It is clear that supervisory officers are managerial and are so treated by the schemes of the *Teaching Profession Act*, Bill 100 and the *Education Act*. In the scheme of the *Education Act*, it is the school board which makes decisions to hire, terminate, demote and promote teaching staff. Without detailed evidence of the extent to which principals are actually called upon to make reports and recommendations of the sort contemplated by section 12 of Regulation 262, or of the role played by the supervisory officer upon receipt of such reports and recommendations, or of the extent to which school boards act routinely on the reports and recommendations of principals alone, we are unable to say whether the duties and responsibilities of principals are such as would bring them within the scope of paragraph 1(3)(b) of the *Labour Relations Act*. The principals' role with respect to non-teaching support staff is also inconclusive as to their "managerial" status in relation to paragraph 1(3)(b) of the Act. The mere exercise of administrative authority over persons who are not members of the bargaining unit into which principals might otherwise fall is one element which can weigh

in favour of finding of managerial status, but in the absence of evidence of the extent to which and frequency with which such duties are exercised, it is not possible to assess whether this aspect of their duties would bring them within section 1(3)(b): see, *Carleton University*, [1975] OLRB Rep. June 500; *University of Windsor*, [1977] OLRB Rep. May 300; and, *Trent University*, [1980] OLRB Rep. June 822.

43. Although we find we are unable to say whether principals are “managerial” when viewed exclusively from the perspective of the *Labour Relations Act*, we think it important to pursue the question further on the assumption that on some set of facts a case to that effect might be made out.

44. The body of Board jurisprudence relied upon by the respondent commences with the decision in *Hydro-Electric Power Commission of Ontario*, [1971] OLRB Rep. Aug. 501 (hereafter referred to as “the *HEPCO* case”). The applicant in that case was the Society of Ontario Hydro Professional Engineers and Associates, an organization of professional engineers which had engaged in voluntary collective bargaining with Ontario Hydro on behalf of professional engineers employed by it during the period when professional engineers fell outside the scope of the *Labour Relations Act*. The Act having been amended to bring within its scope collective bargaining on behalf of employed professional engineers, the applicant sought the appointment of a conciliation officer, and the Minister referred to the Board the question whether he had authority to do so. The respondent opposed the appointment on the ground, *inter alia*, that the applicant was not a trade union. In that connection the Board observed:

6. In order to avail itself of section 13(3) [now 16(3)] the applicant must show that it is a trade union. Section 13(3) presumes that there is an agreement between an employer and a trade union. A trade union is defined in section 1(1)(j) as “an organization of employees”. The status of the applicant as a trade union was challenged on the basis that the applicant included in its membership a number of persons who were managerial and could not qualify as “an organization of employees”. Mr. Val Scott the General Manager of the applicant for the past twelve years testified about the membership of the applicant. We were impressed with the candid and forthright manner in which he gave his evidence. He indicated that there are at least sixty-five persons in the organization who are considered to be managerial and are members of management and that there are also other members who perform managerial functions. He further testified that these people are dues paying members of the organization who associate with the organization in support of its interests as professional engineers. He attempted to clarify the applicant’s position by indicating that the managerial members do not have a part to play with respect to bargaining for wages or working conditions. During re-examination by the applicant’s counsel Mr. Scott candidly stated that as a result of the membership of these managerial people there did exist “a potential for conflict of interest”. Again, he indicated that this had not been a problem.

7. *This Board over the years has refused to give status to purported trade unions on the basis that members of management are or have been involved in its organization.* There are many cases on that point. The whole spirit of the *Labour Relations Act* is to provide trade unions with a separate and distinct identity from management in order to maintain their integrity

in dealing with management. See e.g. section 10, section 13(b) and section 48. Indeed, section 48 makes it an unfair labour practice for management to involve itself in certain trade union affairs. The spirit of the legislation and the cases before this Board which have invoked that spirit resulted because of the potential for a conflict of interest with respect to certain issues in collective bargaining. That is not to say that co-operative and harmonious relations do not exist between employers and trade unions. But it does consider that on occasion there will be issues where relationships must be maintained at arms length. To this end the legislature has required that trade unions be free from any type of management involvement. The "potential for conflict of interest" which Mr. Scott admits exists in his organization is precisely the problem that the legislation has attempted to resolve by requiring that trade unions be separated from management. We pause to note that even the original certificate obtained in 1947 was restricted to professional engineers who were "employees". *On the basis of the evidence before us we have no alternative but to find that the applicant is not an organization of employees but is an organization of both employees and persons exercising managerial functions and accordingly it does not come within the definition of a trade union contained in the Act.*

(emphasis added)

45. Several months after the Board's decision in the *HEPCO* case, the Ontario Court of Appeal in *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 ("the CSAO case") quashed a Board decision which held that an organization was not a trade union because it discriminated between different classes of membership, depriving provisional members of certain rights enjoyed by others, including the right to vote and run for office. At page 501 of his decision, Mr. Justice Jessup observed that:

... by its interpretation of s. 1(1)(n) [now s. 1(1)(p)] the Board assumed power to deny certification to a union on the sole basis of inter-membership discrimination and the question therefore is whether the Board erred in such interpretation.

In my opinion it is clear that it did so. I see nothing in the plain language of s. 1(1)(n) permitting, much less requiring, the introduction of such a factor in the determination of whether a union is an organization within the meaning of the subsection. Nor do I think that the purposes of the statute require the introduction of such a consideration. . . .

At pages 504 and 505, Mr. Justice Arnup observed:

While the Board in its initial decision used some rather inappropriate language as to the nature of the preliminary task it was undertaking, such as that "the Board would not *confer* the status of a trade union upon any organization with such a membership structure", and "the Board is not prepared to *grant the applicant the status* of a trade union", and again speaks in its reasons for its reconsidered decision of "*granting an organization the status* of a trade union", I do not place any emphasis upon the

semantics involved. In my view the question the Board asked itself could be put thus:

“Is the applicant a trade union that we should recognize for the purposes of this Act? In particular, should we refuse to recognize it because of the membership provisions in its by-laws?”

In my opinion the “right question” to which the Board should have addressed itself was:

“Is the applicant a trade union as defined by the Act?”

46. The next case cited by the respondent is *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 87, which dealt with an application for certification by The Professional Embalmers' Association of Ontario. Mr. Elver, the president of the Association and prime mover in its formation, was employed as a funeral director at another establishment. The *Embalmers and Funeral Directors Act* deemed every licensed funeral director to be a licensed embalmer, and imposed on every employed funeral director certain statutory responsibilities which, in the opinion of the majority of the Board, were managerial functions within the meaning of paragraph 1(3)(b) of the *Labour Relations Act*. The Board therefore concluded that Mr. Elver exercised such managerial functions, and determined that:

The applicant is not a trade union which the Board ought to certify in view of the prohibition contained in section 12 [now 13] of the *Labour Relations Act* in light of the participation by Mr. Elver in the formation and administration of the applicant.

The Board came to a similar conclusion in *Leamington District Memorial Hospital*, [1973] OLRB Rep. June 376, in which the Board found that a number of head nurses, who had actively participated in the formation of the applicant nurses association, clearly exercised managerial functions within the meaning of the Act. On the basis of that conclusion, the Board held that section 12 [now 13] of the Act prohibited the Board from certifying the applicant. Neither of these decisions made any reference to the *HEPCO* case or suggested that the applicant was not a “trade union”.

47. In *Chrysler Canada Ltd.*, [1975] OLRB Rep. July 852, the Board was faced with an application for certification by an association of foremen and general foremen employed by the respondent corporation. The respondent argued that the association was not a trade union within the meaning of the Act. One of the arguments addressed to the Board was similar to that adopted in the *HEPCO* case:

7. The second objection has given us more difficulty. The respondent argues that a trade union is, by definition, an organization of employees; that the definition must be read in a literal and restrictive sense to exclude all non-employees; that the applicant's constitution defines “employees” in the broadest terms to include, potentially, non-employees (i.e., managerial persons of the type referred to in section (3) of the Act); and that this potential for non-employees to become members constitutes a fatal defect to the applicant's status as a trade union.

8. Fundamental to the respondent's argument is the proposition that to qualify as a trade union under section 1(1)(n) of the Act, an organization must be able to exhibit that it is comprised solely of employees. Many of the authorities dealing with the concept were canvassed by the Board in the *Ottawa General Hospital* case, [1974] OLRB Rep. 714. The thrust of the submission is that collective bargaining under the Act is premised upon a clear distinction between employers and employees. It would be literally impossible, so the argument goes, for a collective agreement within the meaning of section 1(1)(e) of the Act to be concluded if this distinction is not maintained. Moreover, sections 12, 40 and 56 of the Act, among others, make it abundantly clear that employer participation in the affairs of a trade union is impermissible. The respondent contends, a fortiori, that management membership in an organization constitutes a flaw fatal to any finding that the organization is a trade union.
9. Even assuming the correctness of these general propositions (and we need not do so for the purposes of this decision) we are unable to conclude that the mere possibility that non-employees may be admitted to membership is sufficient to destroy the applicant's status as a trade union. The only evidence before us is that only two classifications — foremen and general foremen — have been admitted into membership. Subject to our finding on their status, it cannot therefore be said that non-employees are now, or have ever been, members of the applicant. We are of the view that we must take the applicant as we find it, and that speculative considerations about future membership are not relevant.

The Board went on to specifically reject an argument of the type adopted by the Board in the *Kelly Funeral Homes Limited* and *Leamington District Memorial Hospital* cases:

13. The respondent argues that if the constitution permits persons exercising managerial functions to be admitted into membership, then the respondent might unwittingly be a party to an offence under sections 12, 40, 56 or some other provision of the *Labour Relations Act*. Even if we were to adopt the respondent's construction of the constitution (and we have not done so), it is difficult to see that there is any real likelihood to jeopardy of the sort raised by the respondent. In our view, the prohibitions contained in those sections of the Act ought not to be applied to persons who, while they may exercise managerial functions, are not in fact acting on behalf of management in joining or supporting the union but, rather are pursuing their own economic interests in the mistaken belief that they have the right to organize and bargain collectively under the Act. This notion was expressed in a different but analogous context in the *Air Liquide* case, 64 (3) CLLC ¶16,002. Moreover, there are many instances where management personnel have erroneously been thought to qualify as employees within the meaning of the Act and the Board has declared otherwise in applications under section 95(2). Indeed, the very existence of section 95(2) reflects a recognition by the Legislature that determinations as to employee status may be required, either during bargaining or during the life of the collective agreement, a recognition which, in our view, *tends to negate the inference*

that the mere presence of management personnel within union membership ranks necessarily destroys the union's status or nullifies the collective agreement to which it is a party.

(emphasis added)

48. In *Armour Associates Ltd.*, [1976] OLRB Rep. March 117, the applicant association was a chartered local of the Retail Clerks International Association set up to organize pharmacists and related workers. Curiously, its by-laws defined its jurisdiction to include “managerial or supervisory [sic] personnel”. Another panel of the Board had earlier found that the applicant’s president and a number of its members were employed by another pharmacy in managerial capacities which brought them within the scope of paragraph 1(3)(b) of the Act. In *Armour*, the Board took note of the court’s admonition in the *CSAO* case that the Board must ask itself “Is the applicant a trade union as defined by the Act?”. The Board then adopted the approach that an organization of both employees and persons exercising managerial functions could not be “an organization of employees” within the meaning of what is now section 1(1)(p) of the Act, and cited the *HEPCO* case in support of that proposition. *Chrysler Canada Ltd.*, *supra*, was referred to, but distinguished on the basis that that case was concerned only with the abstract possibility that non-employees might be admitted to membership and the possible effect of managerial persons acting in a mistaken belief that they are employees for the purposes of the Act, whereas the presence and managerial status of the persons in question before it in *Armour* had both been established. On its analysis, the Board found that the applicant before it was not a trade union.

49. These principles were considered again in *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651. There, the applicant organization was a staff association whose members’ dissatisfaction over the results of their dealings with their employer had led to a decision to take whatever steps might be necessary to enter into collective bargaining within the framework of the *Labour Relations Act*. The association’s constitution was amended to exclude from membership “employees exercising managerial functions”. In discussions about possible voluntary recognition, the association and employer disagreed over who exercised managerial functions and who did not. Although the association had terminated the membership of those it considered managerial, the employer felt it had not gone far enough, as it drew the managerial line lower in its hierarchy than the association did. The employer threatened to challenge the association’s trade union status if it sought to represent and retained in its membership persons whom the employer considered managerial. The association had to its position, and the employer’s threat matured as an issue before the Board. The employer took the position that the disputed individuals exercised managerial functions within the meaning of paragraph 1(3)(b) of the Act. Until that issue was resolved, it argued, the association’s trade union status could not be determined, since a finding that there were “managerial” persons within the association’s membership would preclude a finding that it was a trade union.

50. The Board dealt first with the argument that a determination that members exercise managerial functions would trigger a bar to certification under what is now section 13 of the Act. In that connection, the Board adopted the approach taken in *Chrysler Canada Ltd.*, *supra*, and particularly the analysis in paragraph 13 of that decision (quoted in paragraph 47 of this decision). The Board acknowledged that this approach to the section 13 bar as inconsistent with that adopted in the *Leamington Hospital* case, and disapproved the approach taken in the latter case. The Board asked itself whether there was any evidence that any of the persons in the disputed classifications were acting on behalf of or in the interest of the respondent

employer. It found that there was none, and concluded that the applicant would not be barred from certification under section 13 of the Act even if the persons in those classifications were later found to exercise managerial functions.

51. The Board also dealt with the “employees only” test, which it described this way at paragraph 12 of its decision:

The Board must ask itself, “Is the applicant a trade union defined by the Act?” and answer that question having regard only to the statutory definition. (See *C.S.A.O. National (Inc.) and Oakville Trafalgar etc.* 1972 OLRB Rep. 498). Section 12 of the Act and the definition of trade union interrelate in so far as a trade union which has been the recipient of employer support within the meaning of Section 12 could not, as required by the definition, regulate employer/employee relations as that requirement is construed within The Labour Relations Act, nor could it sign a collective agreement (see section 40). It could not therefore have been intended that such an organization could be found to be a trade union within the meaning of Section 1(1)(n). The definition also stipulates that a trade union be an “organization of employees” and as a result the application must satisfy the Board in this regard notwithstanding the possibility that a number of the persons involved in the organization were not employees for purposes of the Act. The Board has found in both the *Hydro Electric Power Commission case* [1971] OLRB Rep. Aug. 501 and the *Armour Associates Ltd. case* [1976] OLRB Rep. March 117 that an organization of both employees and persons exercising managerial functions is not a trade union within the meaning of the Act. The Board, therefore, in addressing itself to the status of the applicant under section 1(1)(n) must consider the effect of a finding under section 1(3)(b) that certain persons who have been and continue to be active in the applicant organization exercise managerial functions.

In applying this “employees only” test to the facts before it, the Board began with an analysis similar to the one in the last two sentences of paragraph 13 of the decision in *Chrysler Canada Ltd.* It noted that the Act contemplates there will be disputes as to the status of persons, and that there is no mechanism by which the Board can resolve such disputes before an application for certification is filed in which trade union “status” may be an issue. The Board said:

19. . . . It would be an impossible and unfair requirement if a single miscalculation could result in a denial of status. A trade union cannot be expected to correctly anticipate the Board’s decision vis-a-vis Section 1(3)(b). If it attempts to do so and purposely excludes persons in classifications which are questionable it leaves itself vulnerable on the count and if it includes these persons it risks a finding of no status.

20. The test as to whether the applicant is an organization of employees must be based on the eligibility for membership of persons found to be managerial and not simply on the finding of managerial function itself. If such persons are eligible for membership, then clearly the organization is not an organization of employees and the potential for conflict of interest, which is alien to the intent of the Act and the definition of trade union, is established. If, however, the persons found to be managerial are not eligible

for membership, the potential conflict of interest does not exist in that the constitutional bar to membership would be activated upon a Board finding of managerial function under Section 1(3)(b).

21. In the instant case the constitution of the applicant excludes from membership those persons exercising managerial functions. The Board reads the applicant's constitution in light of the statutory requirements which it is attempting to satisfy, (see *Chrysler of Canada (supra)*) and finds that the constitution excludes from membership persons who exercise managerial functions or are employed in a confidential capacity within the meaning of Section 1(3)(b) of the Act. The fact situation before this Board, therefore, can be distinguished from that which was before the Board in both the *Hydro* case (*supra*) and the *Armour Associates* case (*supra*). In both the above referred to cases the constitution and practice of the applicant was to allow into membership persons found not to be employees within Section 1(3)(b) of the Act. In the circumstances the potential for conflict of interest existed and the applicant organizations were properly found not to be trade unions within the meaning of section 1(1)(n).

22. The constitution of the applicant organization in this matter bars from membership persons found not to be employees within the meaning of section 1(3)(b) of the Act. If, therefore, the persons in the disputed classifications are found not to be employees within the meaning of Section 1(3)(b) they will not be eligible for membership in the applicant and neither were they eligible for membership at the date of this application and as a result their "membership" must be found to have been a nullity at that time. Notwithstanding any subsequent Board finding that the persons in the disputed classifications are managerial, the Board is satisfied that the potential for conflict of interest does not exist within the applicant organization and that as of the date of application it was an organization of employees capable of the regulation of employer/employee relations within the meaning of Section 1(1)(n) of the Act.

In summary, the Board concluded that the participation in the affairs of an association by persons later found to fall within paragraph 1(3)(b) would not deprive the association of its status as an organization of "employees only" if the persons in question were ineligible for membership in the association at the time they participated in it.

52. The self-purging feature of the trade union constitution in the *Children's Aid Society of Metropolitan Toronto* case was not present in the constitution of the applicant organization in *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. It was argued in that case that the organization applying for certification could not be a trade union because its constitution did not expressly prevent managerial persons from becoming members. Indeed, the owner of the respondent employer could have fulfilled all the requirements for membership in the applicant. The Board noted, however, that the owner had not been and was not a member of the applicant, and held the fact that the membership requirements were broad enough to encompass the owner did not taint the applicant or negate a finding that it was an organization of employees as required by section 1(1)(n) of the Act. It distinguished the concern expressed in the first sentence of paragraph 20 of the *Children's Aid Society of Metropolitan Toronto* decision, on

the basis that the Board there was concerned with the actual and present apparent membership of persons of doubtful employee status.

53. None of the cases cited by the respondent makes any reference to *Hamilton Construction Association and Builders Exchange v. OLRB* [1963] 2 O.R. 293, (1963) 39 D.L.R. 338, 63 CLLC ¶15,477 (Ont. H.C.). In that case, Local 18 of the United Brotherhood of Carpenters and Joiners of America had applied to this Board for consent to prosecute the employer for its alleged failure to bargaining in good faith with respect to the renewal of a collective agreement. The employer opposed the application on the ground, *inter alia*, that Local 18 was not a trade union because it had within its membership members who were superintendents and non-working foremen who exercised managerial functions in the sense intended by section 1(3(b) of the *Labour Relations Act*. The evidence before the Board was that a large number of superintendents and non-working foremen had been members of Local 18 at the time of their appointment to those positions; after leaving the bargaining unit and becoming "managerial" employees, they remained active members of Local 18 and continued to participate fully in its affairs. The Board granted its consent to the proposed prosecution; in doing so, as the court later noted, it impliedly rejected the employer's argument and found that Local 18 was a trade union entitled to make the application. The employer brought what would now be referred to as an application for judicial review, on the ground that the Board had no jurisdiction to grant consent to prosecute to an organization which was not a trade union within the meaning of the *Labour Relations Act*. The employer's argument in that regard is set out in the court's reasons for decision in the following terms:

Mr. Laidlaw argues that the *Ontario Labour Relations Act* is based on the principle of dealing with two opposing groups, namely, employers, on the one hand, and employees, on the other, and that therefore when the definition of trade union says 'means an organization of employees' rather than 'includes an organization of employees', the definition is intended to confine the membership of a trade union to employees exclusively, and further, therefore, that since the evidence clearly shows that the organization which was granted permission to prosecute by the Board had at that time within its membership those 'with managerial functions', the organization could not then be a trade union, and any finding by the Board that it was a trade union was in contravention of the Act and in violation of the true intent and meaning of the Act.

The court disagreed:

This was a matter that the Board had jurisdiction to determine and, in view of the past history of the union and the evidence before the Board as above-mentioned, I do not consider that the action of the Board was such a disregard of its statutory duty or of the provisions of the Act or so contrary to the true intent and meaning of the Act that it would constitute an abuse of jurisdiction. . . . Even if the question of the said Local No. 18 being a trade union were a collateral issue and even if I could then review the evidence with a view to quashing the Board's decision, I would not disagree with the Board's finding.

The evidence in that case with respect to Local 18's membership is not at all surprising. Many craft unions, particularly in the construction trades, count among their members persons who

have left bargaining units to become non-working foremen, superintendents and even proprietors of businesses. They retain their trade union membership for any number of reasons, the most pragmatic of which may well be their recognition that a change in their fortunes might require a return to employment for which trade union membership is an advantage or prerequisite. Whatever the reason, these trade unions do have such persons among their members, and no one would seriously suggest that they fail to meet the statutory definition of “trade union”.

54. *Hamilton Construction Association and Builders Exchange v. OLRB, supra*, was referred to in *Ottawa General Hospital*, [1974] OLRB Oct. 714. That decision addressed in depth the question whether a managerial person has a right, protected by what is now section 70 of the Act, to become a member of a trade union and to participate in its lawful activities. On a careful review of the provisions of the *Labour Relations Act*, the Board concluded that the Act did not provide such a right. It went on to say, however:

27. We wish to emphasize that our conclusion that a person performing managerial functions under section 1(3)(b) is not entitled to assert rights in relation to union membership and activity, is not to be taken to mean that a trade union is precluded, in all circumstances, from having such persons amongst its membership. As we have already said, the question as to whom the union may receive into membership in the light of sections 1(1)(n), 1(3), 3, 12 and 56 [now 1(1)(p), 1(3), 3, 13 and 64] of the Act, is entirely different from the question of who may rely upon the protections afforded by section 61 [now 70] and other unfair labour practice provisions of the Act relating to union membership. The former question arose in *Hamilton Construction Association and Builders Exchange v. O.L.R.B.*, (1963) 2 O.R. 293. . . .

The Board then recited the facts and result in the *Hamilton Construction Association* case, and quoted, with apparent approval, the court’s comment on the correctness of the Board’s finding that Local 18 was a trade union. Of all of the cases cited by the respondent, only *Chrysler Canada Ltd.* refers to the *Ottawa General Hospital* case. While the doctrine adumbrated in the *HEPCO* case was argued before the Board in *Chrysler Canada Ltd.*, the Board’s decision in the latter case made no mention of the *Hepco* decision itself, and the Board carefully avoided indicating any acceptance of the proposition that the presence in an association’s membership of persons exercising managerial functions disqualifies it as an “organization of employees”.

55. These authorities do not sit well together, and it does not appear to us that the Board’s jurisprudence in this area unequivocally supports the proposition that an association cannot be described as a trade union if it includes in its membership persons who, in the opinion of the Ontario Labour Relations Board, exercise managerial functions. Further, and more to the point, it is not apparent that the *Labour Relations Act* supports such a proposition. In that regard, it will be useful to set out the relevant statutory provisions:

1.-(1) In this Act,

(p) “trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it . . .

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; . . .

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

105. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

This Board does not "confer" or "grant" or, to use the language of the Board in the *HEPCO* case, "give" organizations "trade union status". The only use in the Act of the term "status" in that connection is in the marginal note to section 105 of the Act. The actual language of that section, however, makes it clear that the Board only makes a finding of fact that an organization is a "trade union", it does not give the organization some characteristic it does not already have. "Trade union" is a description, not an award. The only "status" or *in rem* quality which attaches to a determination that an organization fits the statutory definition is that the determination, once made, can be set up as *prima facie* evidence of that fact in subsequent proceedings involving employers and employees who were not parties to the proceedings in which the determination was first made. Sections 13 and 48 describe an organization which has been the object of employer participation or support as "a trade union". If employer participation or support disqualified an organization of employees from being described as a "trade union", as paragraph 12 of the *Children's Aid Society* decision suggests, then the above

quoted portions of sections 13 and 48 would be meaningless and unnecessary. On the language of sections 13 and 48, employer domination does not result in the withholding or removal of the “trade union” label; it results in a denial of certain rights which would be enjoyed by a trade union which was free of employer domination. A finding that an organization is a “trade union” must not, therefore, be conclusive as to that organization’s “status” to be recognized or certified as a bargaining agent under the *Labour Relations Act*. The legislature’s object was to ensure that employers and bargaining agents deal at arm’s length, and to prevent employer dominated unions from standing in the way of organizational efforts of truly employer-independent trade unions. The statutory language employed to accomplish this policy does not require us to read into section 1(1)(p) a limitation based on the nature of duties performed for their employer by individual members of what would otherwise be a trade union.

56. The *HEPCO* case held that the phrase “organization of employees” must be read as “organization of employees only”, having regard to the precision with which the meaning of the word “employee” is limited by paragraph 1(3)(b) of the Act. That reading of the language of paragraph 1(1)(p) would exclude from trade union membership not only managerial persons, who would be considered “employees” but for the deeming provision of paragraph 1(3)(b), but also persons who are not in any sense of the word anyone’s “employee”. If that were the intention of the Legislature, then why it did it so carefully use the “person” in section 3 when describing those who may join and participate in trade unions? The use of that word must at very least contemplate trade unions’ having members who are not “employees” because they are unemployed: see *Ottawa General Hospital, supra*, at paragraphs 24 and 26. While the language of section 3 of the Act does not create for managerial persons a protected right to join and participate in the activities of a trade union, that language is clearly inconsistent with an interpretation of section 1(1)(p) which requires that the phrase “organization of employees” be read as “organization of employees only”. It is noteworthy that none of the decisions which favour the “employee only” interpretation of section 1(1)(p) makes any reference to section 3 of the Act.

57. The *HEPCO* “employee only” interpretation of paragraph 1(1)(p) not only fails to take the language of section 3 into account, it also comes into conflict with characteristics of organizations commonly thought of as trade unions. We have already observed that craft unions tend to have “managerial” members, and that an “employees only” definition would prevent the unemployed from joining trade unions. It must also be recognized that trade unions are often employers themselves; indeed, trade union employees can be and have been the subject of certification applications. In defining a bargaining unit of trade union employees, paragraph 1(3)(b) comes into play and those who act on the union’s behalf in hiring, firing and directing the work of its employed staff will be excluded as “managerial”. If paragraph 1(1)(p) means what *HEPCO* says it does, then either those managerial persons would have to give up their union membership, or the trade union would have to give up its managers or its employees or forfeit its “status”. This is an absurd result.

58. It is important to note also that the *Labour Relations Act* expressly defines “trade union” to include provincial, national and international trade unions. Many such organization exist. Some existed, as OSSTF did, before the Ontario legislature enacted any collective bargaining legislation; those organizations are not disqualified as trade unions by the fact that their founders were not persons then covered by such legislation. A trade union may function in a number of jurisdictions and under a range of collective bargaining statutes. It is not disqualified as a trade union in Ontario by the fact that its members in those other jurisdictions and under those other statutes are not persons covered by the Ontario *Labour Relations*

Act. It can be expected that the legislature in each such other jurisdiction will have recognized that collective bargaining requires an arms-length relationship between “employees” on the one hand and their “employer” on the other, and that in the interest of both sides it is necessary to put “managerial” employees on the employer’s side of the table in shaping any particular collective bargaining relationship. It may be supposed, therefore, that each jurisdiction and each collective bargaining statute will draw that managerial line or assign the task of line drawing to a tribunal empowered to administer the statute. While the principle of separation of employer and employee interests may be clear, the result of its application may vary from jurisdiction to jurisdiction, from statute to statute and from tribunal to tribunal. A legislature may feel that the various interests involved in collective bargaining generally, or in certain employment sectors in particular, are better served by drawing the “managerial” line at a point different from that at which this Board might have drawn the line in the same circumstances. It would seem peculiar and, frankly, pretentious if we were to deny an international, national or provincial trade union the opportunity to represent Ontario employees merely because some legislative body or administrative tribunal has required it to represent persons whom we would not, by reason of their duties, have included in a bargaining unit established under the *Labour Relations Act*. It is one thing to be ever vigilant against the mischief of company dominated unions. It is quite another to insist that those organizations which appear before this Board as trade unions conduct themselves in accordance with our views of membership purity regardless of the consequences to their ability to function in other jurisdictions. When public sector unions (OPSEU, for example) come before this Board for certification under the *Labour Relations Act*, we do not require of them proof that in their representation of employees under other statutes they have not undertaken the representation of, or accepted as members, persons whose job functions might appear to us to be “managerial”.

59. We conclude that the phrase “organization of employees” in paragraph 1(1)(p) of the Act does not mean “organization of employees only”. The mere fact that an organization has in its membership persons whose employment requires them to exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act will not stand in the way of a finding that the organization is a “trade union” within the meaning of paragraph 1(1)(p) of the Act, if it otherwise qualifies to be so described. We respectfully decline to follow those earlier decisions which held otherwise. We acknowledge and share the concern those earlier decisions expressed about the “potential for conflict of interest” which can appear when managerial employees are members of trade unions. The need to keep employers and bargaining agents at arm’s length is fundamental to the scheme of the *Labour Relations Act*, but the right of employees on a majoritarian basis to freely choose their bargaining agent is equally fundamental. As a result, it is not for the Board to withhold rights from a freely selected trade union on grounds other than those contemplated by the Act. Sections 13 and 48 speak to actual employer participation and support. A speculative concern about an organization’s vulnerability to employer domination no more justifies denial of representation rights than would a concern that the composition of a trade union’s general membership, or of another bargaining unit it represents, might divert it from the single-minded pursuit of the interests of the employees in the particular bargaining unit it seeks to represent (see *H. Gray Limited*, 55 CLLC ¶18,011, and *Canadian Iron Foundries*, 56 CLLC ¶18,027). The *Labour Relations Act* provides safeguards against the realization of any potential for conflict of interest. By virtue of section 68 of the Act, a trade union which acquires the right to represent the employees in a bargaining unit assumes a duty to act fairly toward those employees in exercising that right, and that will require that the trade union avoid conflicts with the interests of persons excluded from that unit. While managerial membership alone will not trigger sections 13 and 48, the potential application of those sections to the trade union and, consequently, of section 64 to some one

or more employers, will throw a spotlight on the reasons for such membership, and on the nature and degree of such members' participation in the affairs of the trade union. In the ordinary case, one would wonder why a person would join an organization devoted to collective bargaining in which it cannot represent him. When he is actively involved in those collective bargaining activities, one's wonder would grow at tolerance by his employer and by the trade union of any apparent conflict of interest, especially when the managerial employee had no protected right to join the trade union or participate in its activities. While it will be a question of fact in each case whether managerial members are acting on behalf of employers, there will be some cases where the absence of any explanation for the managerial employees' membership and active participation in a trade union may support an inference of employer domination. There will be few cases where, as here, the employees' allegedly managerial duties and concurrent trade union membership can be explained by the fact that *both* are compelled by law. Thus, sections 13, 48 and 68 encourage trade unions to confine the influence of managerial members; section 64 provides a similar incentive to employers. These provisions, together with the bargaining unit's ultimate remedy of changing or terminating its bargaining agent, are the safeguards the legislature has decided to provide for "conflicts of interest" in a system of free collective bargaining in which the concern for viable and independent bargaining representatives must share attention with the concern for the freedom to choose bargaining representatives on a majoritarian basis.

60. Before leaving this topic, we observe that the characterization of principals' duties for collective bargaining purposes has been the focus of attention on more than one occasion. The Reville committee considered whether or not principals should be excluded from bargaining units under teacher/school board collective bargaining legislation. The question was a difficult and controversial one. There were strong opinions on both sides of the question; the committee members could not agree on an answer. One member felt principals should be and were managerial, and should be excluded from any bargaining unit. The majority accepted that principals were teachers first and foremost and should be able to join with teachers in collective bargaining with boards, but felt they should have the option of forming their own bargaining units if they wished. The legislature ultimately included principals and vice-principals in the teachers' bargaining unit. It cannot be assumed, in the circumstances or at all, that in taking that approach the legislature was oblivious to this important and difficult question and the debate it had engendered. On the contrary, it should be assumed that the provisions of Bill 100 represent the legislature's conscious assessment that the duties and responsibilities of principals are not so "managerial" as to require their exclusion from a bargaining unit of contract teachers represented in bargaining by branch affiliates within the meaning assigned to that term by the legislation. Indeed, the same legislature which enacted paragraphs 1(1)(p) and 1(3)(b) of the *Labour Relations Act* also enacted Bill 100, assigned a collective bargaining role to branch affiliates of OSSTF, decided that principals fell on the employee side of the managerial line, and directed OSSTF's branch affiliates to represent units of contract teachers, including principals. This suggests that the legislature considered OSSTF to be "an organization of employees formed for purposes that include the regulation of relations between employees and employers", and reinforces our conclusion that OSSTF fits within the definition of "trade union" under the *Labour Relations Act* even assuming, without deciding, that from the perspective of the *Labour Relations Act* principals might be regarded as exercising managerial functions. This does not mean that the character of principals' duties can never be a relevant consideration in an application before this Board. The fact that the legislature included principals in a bargaining unit of contract teachers established for the purpose of Bill 100 is not determinative of any issue whether persons exercising similar duties in relation to

employees covered by the *Labour Relations Act* should be included in or excluded from bargaining units of such employees established for the purposes of that Act.

61. As we noted earlier, the Board found OSSTF to be a trade union in *Board of Education for the Borough of Scarborough, supra*, where that question had been put squarely in issue. By virtue of section 105 of the *Labour Relations Act*, that earlier finding constitutes *prima facie* evidence of that fact in these proceedings, and that *prima facie* evidence has not been rebutted. Accordingly, we find that the applicant is a trade union.

Are the employees affected by this application “teachers” within the meaning of Bill 100?

62. Counsel for OSSTF argues that all “teachers”, other than “occasional teachers”, (as those two terms are defined by the *Education Act*) must fall within the scope of Bill 100, because the provisions of the *Education Act* require that all such teachers be employed under the appropriate form of contract. It follows, in his submission, that the scope of Bill 100 is broad enough to include not only the teachers at Humewood House but also teachers engaged in summer school and night school programs. He acknowledges that this submission, at least insofar as it affects summer school and night school teachers, is at odds with statements of law in this Board’s decisions in the *Windsor Board*, *Ottawa Board* and *Scarborough Board* cases. Counsel submits that the Board in *Windsor Board* was wrong in concluding that Bill 100 focuses only on the relations of teachers and school boards during the regular school year. Counsel notes that both of the parties in that case, each for its own reasons, took the position that the employment relationship between the school board and a teacher teaching in the summer school program would not be covered by Bill 100. It would have been inconsistent for the school board to argue otherwise, since it was taking the position that it had no obligation under Bill 100 to negotiate with respect to that employment. From the perspective of the teachers, the concession was an element of an ultimately successful defence. As a result of self-interest, counsel submits, neither of the parties urged on the Board the full implications of the provisions of section 230 of the *Education Act* or the decision of the Ontario Court of Appeal in *Ontario Teachers Federation v. Metropolitan Separate School Board, supra*. The proposition that Bill 100 governs school board/teacher labour relations only in the “regular school program” was not challenged in either of the subsequent “pink letter” cases. All three decisions, therefore, rest on an agreed proposition of law now challenged by OSSTF as incorrect. Counsel for OSSTF acknowledges that in each case his client was one of the parties to the agreement, but notes that the doctrine of estoppel cannot be invoked to prevent the operation of a public statute, citing *Culliton Brothers Limited*, [1982] OLRB Rep. March 357 and the authorities referred to in paragraph 21 of that decision. He also concedes, and not just “for the purpose of this case”, that the job action at issue in each of the “pink letter” cases was a “strike” within the meaning of Bill 100.

63. Counsel for OSSTF argues that a “teacher” (which term excludes a “temporary teacher” who, by definition, does not have the qualifications to be a “teacher”) is either an “occasional teacher” or a “contract teacher” — that is, a probationary or permanent teacher who, by virtue of section 230 of the *Education Act*, is entitled to be employed pursuant to a written contract whose terms are to be set out in regulations under the Act. Counsel concedes that when we examine the form of contract currently provided for in the Regulations under the Act, it appears to contemplate the employment of teachers in the regular school year, and does not make much sense as a format for employment of teachers in a summer school program. Counsel argues that the teachers employed in summer school and other programs outside the regular school program nevertheless have a statutory right to a written employment contract

in prescribed form. He submits that the absence in the regulations of an appropriate form of contract for all the school programs in which teachers might be employed cannot negate that statutory right. In that connection he cites *Carling Export Brew. & Malt. Co. v. The King*, [1931] 2 D.L.R. 545, a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Canada, holding that the failure to promulgate regulations contemplated by an exemption provision in a taxing statute did not render the exemption nugatory. Counsel submits that the teachers at Humewood House do not fall outside of the statutory scheme merely because the school board describes them as “tutors”, any more than the teachers employed as “co-ordinators” in *Ontario Teachers Federation v. Metropolitan Separate School Board* fell outside the *Teaching Profession Act* definition of teacher. Because the teachers at Humewood House have the appropriate “teacher” qualifications under the *Education Act*, and are not “occasional teachers”, they are deemed to be employed under the appropriate form of contract. Counsel cited the Board’s decision in the *Etobicoke Board* case, urged on us the purposive approach it takes to the interpretation of section 1(m) of Bill 100, and submitted that each of the teachers at Humewood House is employed “as a teacher” as that phrase was interpreted in that decision. In the result, counsel submits, these teachers do fall within the definition of “teacher” in section 1(m) of Bill 100.

64. Counsel for the school board argues that the teachers at Humewood House are not contract teachers, and that Bill 100 does not apply to them even if they are contract teachers. Counsel emphasizes the fact that the program in which these teachers are engaged as “tutors” is but one of a number of programs operated at Humewood House, and that the teachers form part of a team with the staff at Humewood House in providing special services to the clientele of Humewood House. He notes that there is no principal on site at Humewood House, no school calendar has been adopted, and the education program’s four day per week scheduling does not fit easily with the “regular school year” concept detailed in Regulation 822/82 under the *Education Act*. Counsel adopts and relies on the “regular school year” reasoning in the *Windsor Board* decision. Pointing to the references to “school” in the definitions of “lockout” and “strike” in Bill 100, and the fact that Bill 100’s definitions of “principal” and “vice-principal” incorporate by reference definitions which employ the word “school”, counsel asks us to conclude not only that the scope of Bill 100 is limited to employment during the regular school year, but that it is further limited to employment in a “regular day school”: that is, a regular day program in a regular school facility. Counsel argues that the education program at Humewood House is not a “school”. If it were a “school”, both it and the school board would have to comply with the regulations prescribing a “regular school year”, and the school board would have to assign a principal to it. Since the program does not have a principal or comply with those regulations, he submits it could not be a school. In this connection, counsel concedes that teachers in “regular day schools” would not lose coverage under Bill 100 if their principal died, but says this is because a new principal would immediately be appointed. Counsel relies on the distinction drawn in the *Windsor Board* decision between mandatory and discretionary activities of school boards, and the “normal and mandatory” gloss added by the Kennedy Award. He notes that involvement in section 15 programs is a discretionary activity which, on this mandatory/discretionary analysis, must fall outside the scope of Bill 100. Counsel explains that the school board treats teachers in two other section 15 programs as contract teachers covered by collective agreements made under Bill 100 because those programs are physically situated in school buildings to which a principal has been assigned, albeit in classrooms leased to the organizations involved. He concedes that the school board regards teachers of kindergartens, which are also discretionary programs, as falling within the scope of Bill 100, and explains this by saying it is not so much a question whether programs are mandatory or discretionary activities as whether the activities at issue are “normal”.

65. Counsel for the school board argues that employment as a teacher in an educational program funded under section 15 of the Regulations is specifically dealt with in paragraph 38 of section 150 of the *Education Act*. He contrasts the language of that paragraph with the language of paragraph 2 of section 150, which makes specific reference to the requirements of Part IX of the Act. He argues that the use of the words “employ and pay” in paragraph 38 suggests that this is employment outside of the scope of paragraph 2 and, hence, Part IX of the *Education Act*; otherwise, those words would not have been necessary. He notes there is no specific reference in section 150 to a mechanism for the employment of teachers in summer school and night courses, and suggests these distinctions emphasize the different character of the employment authorized by paragraph 38 of section 150.

66. Counsel for OSSTF submits that the status under Bill 100 of the teachers employed in the educational program at Humewood House does not depend on the status of Humewood House as a “school”. In any event, he argues, the educational program in which those teachers are engaged is a “school”, having regard to the broad definition of “school” in the *Education Act*. Additionally, he submits that the authority for section 15 of the General Legislative Grants Regulation comes from paragraph 15 of subsection 10(1) of the *Education Act*, and argues that the language of that paragraph supports the view that an education program provided in a facility contemplated by section 15 is a “school” in the functional sense intended by the definition of that term in section 1(1)49 of the *Education Act*. He argues that paragraphs 2 and 38 of subsection 150(1) do not create mutually exclusive employment mechanisms. As for the four day per week schedule and the absence of a principal, counsel submits that the respondent surely can not rely on a breach of statutory and regulatory provisions to avoid other statutory requirements, particularly as the breaches, if indeed there are any, are its own responsibility.

67. We have no jurisdiction to certify any trade union to represent the teachers employed by the respondent at the Humewood House if they are teachers “as defined in the School Boards and Teachers Collective Negotiations Act”: section 2(f), *Labour Relations Act*. That definition is found in section 1(m) of Bill 100. It has three basic elements. A section 1(m) “teacher” is someone who,

- (a) has the appropriate legal qualification or permission to teach;
- (b) is “employed by a board under a contract. . . .in the form prescribed by the regulations under the *Education Act*”;
- (c) is “employed. . . .as a teacher”

and does not fall within any of the exceptions listed at the end of the definition. The employees in question do not fall within any of those exceptions, and it is common ground that they are qualified to teach and therefore, meet the first of these three criteria. The question we must consider is whether they satisfy the other two.

Are These Teachers “Employed By a Board Under a Contract. . . .In The Form Prescribed By The Regulations Under The Education Act”?

68. There is no doubt that the respondent is a “board” as defined in paragraph 1(c) of Bill 100, or that it employs the teachers in question. The respondent has not executed a contract in the prescribed form with any of these teachers, but it was not seriously suggested that that

fact disposes of this issue. Subsection 230(2) of the *Education Act* requires that a board execute written contracts with certain types of teacher; if in any case the Board fails to do so, the subsection deems that a permanent teachers' contract has been entered into. In *Ontario Teachers Federation v. Metropolitan Separate School Board*, *supra*, the Ontario Court of Appeal held that the operation of a similar deeming provision in the predecessor section of the *Schools Administration Act* was sufficient to satisfy a similar contract requirement in the definition of "teacher" in the *Teaching Professional Act*. On the basis of the reasoning in that decision, we are satisfied that a teacher without an existing contract in the form referred to in section 1(m) of Bill 100 will nevertheless satisfy that requirement of the definition if he or she is deemed by subsection 230(2) of the *Education Act* to have such a contract.

69. In interpreting the provisions of the *Education Act*, it is important to remember that the unmodified word "teacher" designates a person qualified to teach; it says nothing about what that person is employed to do. Apart from supervisory officers, the definitions in the Act now contemplate three categories of employees qualified to teach: "permanent teacher", "probationary teacher" and "occasional teacher". Only the definition of "occasional teacher" specifically incorporates the limiting words "employed to teach". As the Court of Appeal held in *Ontario Teachers' Federation v. Metropolitan Separate School Board*, an employee qualified to teach may be a "permanent teacher" entitled to a permanent teacher's contract even though he or she is not employed by the board "to teach" and has no teaching duties. Section 230 of the *Education Act* imposes restrictions on the employment relationship a school board can establish with a person qualified to teach. Whether employed full time or part time, such a person must be employed either as a "permanent teacher", or as a "probationary teacher" or as an "occasional teacher". Permanent and probationary teachers must be employed pursuant to written contracts containing terms which subsection 2 anticipates will be prescribed by regulation in the form of a contract. If there is no actual written contract in appropriate form covering the employment of a person entitled to a contract, then that person is deemed to have a permanent teacher's contract. Read together with the statutory definitions, the plain language of section 230 means this: every board employee qualified to teach is entitled to a written contract unless they are employed as an "occasional teacher" defined in paragraph 1(1)31; and, every employee who is entitled to a permanent or probationary teacher's contract but does not have one, is deemed to have a permanent teachers' contract and thus, by definition, is a permanent teacher. The combined effect of sections 230 and 232 is that a probationary teacher becomes a permanent teacher automatically if the school board employs him or her beyond the probation period specified in section 232. Permanent teachers are entitled to the job security provided by the Boards of Reference provisions of sections 238 to 248 of the *Education Act*. To use the language of the universities, permanent teachers have a form of "tenure", and probationary teachers are on a "tenure track". The scheme of the Act, as reflected in the provisions mentioned, is to maximize the "tenure" opportunities of qualified teachers by severely limiting a board's ability to hire teachers on other than a "tenured" or "tenure track" basis.

70. The statutory history reviewed earlier in this decision reinforces the impression that the current legislation means just what it says. The *Education Act* represents the result of a process of evolution in which the rights of teachers to job security and a written contract have been entrenched with increasing precision, and the opportunities for school boards to avoid the application of those rights have been successfully restricted. Starting in 1938, the predecessors of the *Education Act* afforded contract teachers the job security of the sort now provided for in sections 238 to 248 of the *Education Act*. At first, however, a teacher's status as a contract teacher depended on whether the school board had actually executed a written contract, and

the form and contents of the contract were not prescribed by law. The prescription by regulation of standard terms and conditions of employment in the form of a contract was first authorized by statute in 1945, but was not carried out until 1954. Of course, a "tenure" system had to take into account the fact that tenured teachers might for any number of possible reasons be unable to perform their duties for temporary periods of varying duration. The duties of an absent tenured teacher would have to be performed by another qualified teacher, and if that substitute thereby became entitled to tenure there would soon be far more tenured teachers than teaching positions. Before forms of contract were finally prescribed in 1954, the terms "permanent teacher", "probationary teacher", "temporary teacher" and "occasional teacher" were introduced into the legislative framework for use in describing which teachers were to be entitled to the prescribed contract and which were not. From 1954 to 1966, the scheme of the predecessor statute was that a person qualified to teach could be employed as a "permanent teacher", "probationary teacher", "temporary teacher" or "occasional teacher". A permanent or probationary teacher was entitled to an actual or deemed contract in prescribed form; a "temporary" or "occasional" teacher was not. An "occasional teacher" was one hired on a day-to-day basis as a substitute for a non-occasional teacher. A "temporary teacher" was a qualified teacher hired on a month-to-month basis. An occasional teacher could be engaged as a substitute for a "temporary teacher". Thus, whether intentionally or inadvertently, the language of the statute then permitted school boards to fill a teaching position with a qualified teacher, without giving the teacher the prescribed form of contract, simply by hiring the teacher on a month-to-month basis. The 1966 amendments seem to have eliminated that option. A person qualified to teach could no longer be employed as a "temporary teacher", as a result of the total redefinition of that term. At the same time, the definition of "occasional teacher" was amended so as to permit hiring of an occasional teacher on any basis, including month-to-month, so long as the hiring was as a substitute for a non-occasional teacher. After the 1966 amendments, a person qualified to teach could only be employed as a permanent teacher, probationary teacher or occasional teacher, or so the structure seemed to imply. (The Court of Appeal seems to have found that implication in the legislation in *Ontario Teachers Federation v. Metropolitan Separate School Board*. The explicit language adopted in sub-section 230(1) of the *Education Act* eliminated any doubt, at least prospectively.) The provisions requiring contracts and deemed contracts for permanent and probationary teachers were amended in 1971 to delete the express statutory requirement that a teacher employed on the terms of a deemed contract be paid salary "in ten monthly payments". The definition of "occasional teacher" was further amended in 1973 in a manner which eliminated the possibility of employing a qualified teacher to fill a vacant position on an indefinite basis, without a permanent or probationary teachers' contract, on the pretext that the teacher was only occasional because he or she was employed as a "substitute" for the previous (and perhaps long departed) incumbent of the position. These changes all display a concern that the greatest number of board employees qualified to teach receive the job security and other rights associated by statute with a written contract, and that they not be deprived of a contract, and its associated rights, by oversight or semantic subterfuge. Against that background, the rigidity of the employment structure created by section 230 and associated provisions of the *Education Act* is unsurprising.

71. Nothing in section 230, or in any other provision of Part IX, expressly limits its application to teachers whose duties require them to teach at particular times of day or year or on property owned or controlled by any particular persons or to pupils of any particular age or state of mental or physical health. On its face, Part IX has universal application to every employment relationship a school board may have with a person qualified to teach. Standing alone, the language of paragraph 150(1)2 is consistent with and reinforces the impression that Part IX is intended to be universal in application. Counsel for the respondent school board,

however, says Part IX is not universal in application. He points to the forms of contract prescribed in Reg. 277, and says those contracts would not accommodate certain kinds of employment arrangements which school boards make with certain teachers; therefore, the requirement of a contract must not apply to those kinds of arrangements. As for the employment arrangements here, he says they are authorized by paragraph 150(1)38 and therefore are not governed by Part IX. We will deal with the latter argument first.

72. Nothing in the language of paragraph 150(1)38 of the *Education Act* is inconsistent with application of Part IX of that Act to the employment contemplated therein. In our view, the language of paragraph 38 does not create a separate employment scheme beyond the reach of paragraph 150(1)2, or Part IX. Our interpretation does not leave meaningless the use of the words “employ and pay teachers” in paragraph 38. Those words must be read together with the words “to conduct an education program” which follow it; when read that way, it is clear that the words “employ and pay” serve as part of a phrase intended to describe or circumscribe the duties which may be assigned to a teacher in the circumstances contemplated. Paragraph 38 of subsection 150(1) modifies or limits the powers referred to in paragraph 2, but does not exclude or serve as an alternative to them.

73. Underlying the respondent school board’s arguments in this case is a general proposition that qualified teachers can somehow be employed by a school board, otherwise than as occasional teachers, and not be entitled to the contract contemplated by section 230(2) of the *Education Act*. This category of qualified, non-occasional, non-contract teacher is said to include summer school teachers, on the authority and reasoning of the *Windsor School Board* decision. By analogous reasoning, the argument expands to take in teachers in evening classes and, if one accepts the analysis of the Kennedy Award and counsels gloss on it, any teacher employed by a school board otherwise than in a “regular day school” conducted in a board-owned school building, under the active administration of a duly appointed on-site principal, and in full conformity with each and every one of the myriad regulations which bear on the operation of the school program which school boards are obliged to provide and school-aged children are obliged to attend. The argument for the existence of this class of non-occasional, non-contract teachers begins with the observation that the terms of the contract provided for in the regulations under the *Education Act* are inapt for employment of the limited duration of a summer school program. The contract, it is argued, is designed for the “regular school year”; it is designed, in other words, for employment of indefinite duration involving active duties only during the months of September through June inclusive each year. Since this is the contract referred to in section 230(2), and since the Legislature must not have intended teachers engaged in programs outside the regular “school year” to be covered by a contract not suited to their employment, it is argued that the teachers referred to in section 230 must not include summer school teachers. The argument for exclusion of evening school or continuing education teachers will be (as it was in *The Ottawa Board of Education*, (Carter), unreported arbitration award dated March 21, 1984) that the programs in which they are employed are organized on a semester basis or on some time frame other than September to June. The reasoning which further extends these limits to exclude all but teachers in the “regular school program” is best left to speak for itself: see the extract from the Kennedy Award reproduced at paragraph 37 above.

74. Although we do not have to decide in this case whether teachers hired just to teach summer school are entitled to contracts under section 230(2) of the *Education Act*, it would be appropriate to make some observations on the question, since it represents the cutting edge of the proposition that some non-occasional teachers employed by school boards must not be

entitled to contracts. Our first observation is that the application of the regulatory form of contract to summer school employment would not require that summer school teachers receive over the course of ten months the remuneration they earn teaching during a considerably shorter summer school program. The contract permits payment of salary in more than 10 payments with *any* desired periodicity, provided only that at least one-twelfth of the total for the year is paid "on or before the last teaching day of each teaching month". Since "teaching month" is nowhere specially defined, it may be interpreted simply as a month in which teaching takes place. The remuneration of a teacher employed to teach for 6 weeks, for example, could all be paid in conformity with this requirement by making 11 or more payments each separated by two or three working days. This is not elegant, and obviously would not have been contemplated in 1954; the point is simply that the language of the regulatory form of contract can be satisfied without either depriving the summer school teacher of the benefit of statutory changes which have occurred since the regulatory form of contract was drafted or depriving the school board of a summer school employee qualified to teach. While section 231 of the *Education Act* and the language of the regulatory form of contract both appear to contemplate a contract of indefinite hiring covering the performance of duties in a ten-month portion of the year, that form of contract has been found applicable to other arrangements. In *Ontario Teachers Federation v. Metropolitan Separate School Board* the school board argued that qualified teachers employed as "coordinators" were not entitled to a contract because their non-teaching duties and the required twelve-month-a-year performance of them were both repugnant to the regulatory form of contract. The Court of Appeal rejected both arguments. In the *Ottawa Board of Education* arbitration award, *supra*, Professor Carter similarly rejected an argument that teachers in adult day schools operating twelve months per year and organized on a three-semester-per-year basis could not by reason of those facts be entitled to a contract under section 230(2) of the *Education Act*. When one starts from the perspective that a year-to-year or indefinite term contract which contemplates only 10 months' duties per year is normal, a year-to-year contract covering a smaller number of months' duties per year should seem no more peculiar than one that calls for 12 months' duties per year. The normal contract essentially provides for a seasonal layoff in June with right to recall in September. If the regulatory form of contract can accommodate employment just for the duration of summer school it would provide the right to recall for successive summer schools until terminated in accordance with its terms and subject to the provisions of section 238 to 248 of the *Education Act*.

75. The definitions of "teacher" in both the *Teaching Profession Act* and Bill 100 apply only to teachers employed under contract in the prescribed form. In both cases, the legislature expressly excluded "a person employed in a school for a period not exceeding one month". This clearly is referring to employment entered into with the expectation that it will last one month or less. This exclusion would be wholly unnecessary if the regulatory contract contemplated by Part IX of the *Education Act* could only cover indefinite employment. Perhaps it is not a coincidence that the definition of "teacher" in *The Teaching Profession Act* did not change in response to the enactment in 1954 of *The Schools Administration Act* and its new definitions until 1967, following the 1966 amendments to *The Schools Administration Act* which appear to have created contract entitlement for all non-occasional, qualified teachers. Although it was not argued, we have also considered whether the phrase "full time or part time" used to modify "teacher" in subsection 230(1) of the *Education Act* creates an opening for non-occasional, non-contract teacher employment. The exclusionary reference in that subsection to "occasional teacher" implies that "full-time" and "part-time" are used in a sense which might aptly describe at least some occasional teachers and, therefore, that a teacher who is engaged for less than a full "regular school year" could nevertheless be "full-time" or "part-time" in the sense

intended. Words and phrases not specially defined should be accorded their ordinary meaning unless the context requires otherwise. In ordinary usage, “full-time” refers to the number of hours worked on the job per week, not to the duration of the job assignment; this view is consistent with the definition of “part-time” in paragraph 1(1)33 of the *Education Act*. Having regard to the thrust of the statute and its history, it is more likely that “full-time and part-time” was intended to be inclusionary. In any event, it is difficult to imagine, in the context of this statute, non-“occasional” employment which cannot be aptly described either as “full-time” or as “part-time”, and it is extremely difficult to imagine any such employment which would not in any event be caught by the one month exclusion in paragraph 1(m) of Bill 100.

76. The regulatory forms of contract in effect today are essentially the forms first adopted in 1954. The draftsman’s task then was to set out universal terms and conditions for the employment of persons entitled to such contracts: permanent and probationary teachers. The form adopted for the permanent teacher was a contract of indefinite hiring especially, but perhaps not exclusively, suited to employment in which active duties are only performed during the months of September to June, inclusive. It does not lend itself to a hiring on a month-to-month basis. That is not surprising. In 1954, and until 1966, qualified teachers hired on a month-to-month basis were plainly and explicitly not entitled to a contract in prescribed form. That form was not amended in any relevant way after the 1966 amendments, or any of the subsequent amendments discussed earlier. Whatever the reason may be for that, it cannot be supposed that the inertia of the regulatory language undid or nullified the clear effect and intent of the statutory amendments and the altered system they created. Neither the *Education Act* nor any of its predecessor statutes authorized regulations that could expressly or by implication amend the statutory definitions or permit employment relationships prohibited by statute. Where the meaning of the provisions of a statute and of a regulation thereunder are in conflict, the statutory provision prevails: *Institute of Patent Agents v. Lockwood*, [1984] A.C. 347 (H.L.) per Lord Hershell at p. 360; and, *Belanger v. R.*, (1916) 54 S.C.R. 265 (S.C.C.), esp. per. Duff, J. at pp. 274-276. Indeed, it is doubtful that a regulation can even be resorted to as an aid to construction of the statute under which it has been promulgated: see *Stephens v. Cuckfield R.D.C.*, [1960] 2 Q.B. 373 (C.A.) at p. 381, and, P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed., at pp. 74 and 75. While subsection 230(2) contemplates that there will be a regulation specifying forms of contract, it does not refer to it as “the existing regulation” or otherwise incorporate by reference the 1954 work of the regulatory draftsman. While the legislature which enacted the *Education Act*, 1974 might be taken to have been aware, when it did so, of the terms of the regulation then in existence under *The Department of Education Act*, it would also have been aware that by enacting the former it was repealing the latter Act, and that in those circumstances the *Interpretation Act*, R.S.O. 1970, c. 225 (now R.S.O. 1980, c. 219), provided as follows:

15. Where an Act is repealed and other provisions are substituted by way of re-enactment, amendment, revision or consolidation,
 - (a) all regulations, orders, rules and by-laws made under the repealed Act continue good and valid in so far as they are not inconsistent with the substituted Act until they are annulled and others made in their stead;

In short, if there was any inconsistency between the apparent meaning of the Act and the thrust of the existing regulation under the predecessor Act, the Legislature could only have intended that the inconsistency be resolved in favour of the plain meaning of the new Act. It should be

noted, however, that there is nothing in the *Education Act*, or in the nature of any of the board activities and programs contemplated by that Act, which prevents a board from filling the teacher staff requirements of any such program with teachers engaged on the terms set up in Form 1 of Reg. 277. There is no legal reason why summer schools could not be staffed entirely with people who are employed by the board on an indefinite basis and have other duties in other months of the year, if that is what the form must be taken to require. Pragmatic and economic considerations may well favour a different approach from the point of view of school boards, but those considerations would also militate against tenure rights in any form for any teacher under any circumstances. The provisions of the *Education Act* with which we are concerned here clearly represent a balancing of the divergent interests, pragmatic, economic and otherwise, of teachers and school boards, and the interpretation of those provisions cannot be based on an assessment of the effect an interpretation might have on just one of those two interest groups.

77. In our opinion, the contents of the regulatory form of contract cannot be taken to, and in any event do not, create a class of teacher employee not contemplated by section 230 of the *Education Act*. The school board's argument to the contrary boils down to this: if the *Education Act* seems to say we cannot do what we are doing and would like to continue to do, then it must not mean what it says. To achieve this result, the board relies on a supposed inconsistency between what appears to be contemplated by the language of section 230 and what appears to be contemplated by the regulatory form of contract. We note there is no conflict between the Act and the existing regulation if their combined effect is taken to be this: school boards cannot employ persons qualified to teach unless they are employed on terms consistent either with the definition of occasional teacher or with the language of the form of contract prescribed by regulation. Such an interpretation is in perfect harmony with the scheme of the *Education Act* and its statutory history; that it would preclude school boards from staffing programs with qualified teachers hired on a month-to-month basis cannot be an unexpected result in that context.

78. The teachers at Humewood House are employed on a "regular school year" basis, in the sense that they are employed to perform duties in the period September to June, inclusive. That aspect of their employment is certainly not inconsistent with the regulatory form of contract. One teacher was described to us as being "part-time", and the others were described as "full-time"; we are satisfied that they are each either "full-time" or "part-time" in the sense in which those terms are employed in section 230 of the *Education Act*. Having regard to the scheme of that Act, we are satisfied that these teachers must be permanent teachers within the meaning of that Act and by section 230(2) thereof entitled to and deemed to have the contract contemplated by paragraph 1(m) of Bill 100. In short, they satisfy the second of the three criteria referred to in paragraph 67 of this decision.

Are The Teachers At Humewood House Each "Employed . . . As A Teacher"?

79. On this branch of the test, the word "teacher" is used to describe a job function. Counsel for the respondent argues that its employees at Humewood House are employed "as tutors", not "as teachers", and could not be teachers in the functional sense because the educational program at Humewood House is not a "school". The meaning of the phrase "as a teacher" in paragraph 1(m) of Bill 100 was analysed in *Board of Education for the Borough of Etobicoke, supra*. We approve and adopt the approach the Board took in that case, both as to the meaning of "as a teacher" and as to the interpretation of Bill 100 generally. We reject the argument that the educational program at Humewood House must in some sense be a

“school” before the board employees there can be “teachers”. We also reject the argument that the education program conducted at Humewood House is not a “school” within the meaning of Paragraph 1(2)49 of the *Education Act*. That definition does not require that the lands and premises in which pupils are taught be owned by a school board. Nothing in Bill 100 requires us to imply into paragraph 1(m) any limitation of scope based on when or where a teacher teaches, the ownership of the building in which teaching takes place or the characteristics or needs of the pupils taught. We see no warrant for the treatment otherwise than as teachers of persons engaged in teaching pupils with special problems, or for the exclusion from the scope of Bill 100 of educational programs which have been integrated with the delivery by other professionals of services designed to meet the special developmental or personal needs of the pupils taught. There would have been no reason for the Legislature to treat the labour relations of teachers in kindergartens and junior kindergartens, gym classes, special education programs or school libraries, to choose a few “discretionary” examples (see s. 150(1), ¶ 10, 13, 14 and 40), any differently than the labour relations of teachers in “mandatory”, “regular” or “normal” programs. In the absence of express language requiring such distinctions, we will not read them into Bill 100. The teachers in question here are teaching in the ordinary sense of the word; indeed, they teach the very courses taught in “regular day schools” to pupils who, but for their special problems, would be taught those same subjects in a “regular day school”.

80. If the approach of the Kennedy award were correct, the application of Bill 100 to a non-occasional teacher who was clearly teaching in the ordinary sense would depend on the employment arrangements the board chose to make with the teacher, coupled with some assessment of how “normal” or “regular” the teacher’s assigned duties were. It would be reasonably clear that a non-occasional teacher was covered by Bill 100 if the duties assigned only involved: teaching from September to June, during the day, in a classroom in a building owned by the board and operated under the administrative authority of an on-site principal, to a class of normal, healthy, unexceptional pupils aged between 6 and 15, inclusive, who all reside in the appropriate geographic area. The assignment of any duties which failed to satisfy all these parameters would weaken the teacher’s claim to coverage under Bill 100, and at some level of irregularity or abnormality the teacher would flip out of Bill 100 into the *Labour Relations Act*. Under that approach, there might be teachers on the “abnormal” side of the line with respect to whom boards have negotiated with branch affiliates. If their terms and conditions of employment are covered in an agreement between a board and a branch affiliate, then it would be arguable that in its coverage of “abnormal” teachers, the agreement is a collective agreement within the meaning of the *Labour Relations Act*, and in its coverage of “normal” teachers it is an agreement within the meaning of Bill 100. “Abnormal” teachers not covered by such agreements would be entitled to engage in collective bargaining under the *Labour Relations Act* through any bargaining agent the majority might select, which would leave the definition of “abnormal” to be determined by this Board on a case by case basis. Renegotiation of the resulting collective agreements, and of the “abnormal” portion of existing Bill 100 agreements, would proceed on the time table contemplated in the *Labour Relations Act*. The Education Relations Commission would have jurisdiction over the Bill 100 or “normal” portion of negotiations, and this Board would have jurisdiction over the “abnormal” portion. The parties would go through both fact finding and conciliation. Determination of eligibility to participate in the supervised votes contemplated by section 63 of Bill 100 would require individual assessments by the Education Relations Commission of regularity and normalcy of, *inter alia*, the location and composition of the classes taught by each teacher. We could, but need not, go on. We do not believe the Legislature intended the labour relations of non-occasional teachers to be fragmented in this administratively unmanageable manner, or at all.

81. In his recent award in *The Ottawa Board of Education, supra*, Professor Carter reviewed the analysis of Bill 100 in *Board of Education for the City of Windsor, supra* and the elaboration thereof in the Kennedy Award. His conclusions are found at pages 19 to 21 of his award:

Does this line of authority restricting the scope of the School Boards and Teachers Collective Negotiations Act rest on a firm foundation? From the perspective of statute interpretation, there is no express language in the legislation that would indicate a legislative intent to confine its scope to either teachers employed during a regular school year of [sic] teachers employed in mandatory or usual activities. Can it be said, however, that there is some valid labour relations justification for reading into the legislation either type of restriction? We think not. Section 5 of the School Boards Teachers Collective Negotiations Act provides that a branch affiliate should, in negotiations and procedures under this Act, represent all the teachers composing its membership. The effect of either restricting the scope of the Act to only those teachers employed during a regular school year, or to those employed in usual or mandatory activities, would create a situation where not all teachers composing the membership of the branch affiliate would be covered by the collective bargaining regime established under the School Boards and Teachers Collective Negotiations Act. The result would be two parallel collective bargaining structures for teachers — one governed by the School Boards and Teachers Collective Negotiations Act and the other governed by the Labour Relations Act. To add to the confusion there would also be the possibility that the same teachers might also fall under both structures if they were employed in both the regular day programme and the continuing education programme. In our view, an interpretation of the legislation that would create such a chaotic collective bargaining structure for teachers should be avoided.

On the basis of our analysis of the relevant statutory provisions, we agree with Professor Carter. We also must respectfully reject the approaches taken to interpretation of Bill 100 in *Board of Education for the City of Windsor* and in the Kennedy Award. The better approach, in our view, is the one taken by this Board in *Board of Education for the Borough of Etobicoke, supra*. In our opinion, “teacher”, as defined by paragraph 1(m) of Bill 100, by virtue of section 230 of the *Education Act*, encompasses every full-time or part-time board employee who is qualified to teach and is employed “as a teacher”, other than “occasional teachers” and persons expressly excluded by the concluding words of the definition. We find that the teachers at Humewood House are each “employed. . . as a teacher”, and therefore satisfy the third of the three criteria identified earlier in this decision.

Conclusion

82. We conclude that each of teachers at Humewood House is a “teacher” within the meaning of Bill 100. On that issue we must respectfully disagree with the contrary finding of the majority of the arbitration board chaired by Mr. Kennedy. As for that majority’s other finding that these teachers are “not covered” by the subsisting collective agreement between OSSTF District 14 and the respondent, its correctness or otherwise has no effect on our jurisdiction. Bill 100 does not leave definition of the bargaining unit to the parties: all teachers who fit the paragraph 1(m) definition are in a bargaining unit under Bill 100. Bill 100 does

leave to the parties negotiation of the terms and conditions of employment of teachers in the bargaining unit. It is possible that parties might fail to address the terms and conditions of some bargaining unit members in such a way as to leave the school board's power under paragraph 150(1)2 of the *Education Act* to set those terms and conditions unfettered by anything other than the provisions of the *Education Act* and Regulations thereunder. When we asked during argument, Mr. Green told us that his client had never responded to a school board's refusal to deal in bargaining with summer, night school or other disputed categories of teachers by filing a bad faith bargaining complaint with the Education Relations Commission under subsection 60(1)(f) of Bill 100. Given that fact and the legal position which the applicant has until recently taken before this Board and boards of arbitration, it would not be surprising if arbitrators discover, as Professor Carter did in *The Ottawa Board of Education, supra*, that the applicant's branch affiliates have negotiated collective agreements which fail to make any provision for some teachers whom section 5 of Bill 100 requires them to represent.

83. In summary, we conclude that while the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, the persons for whom it seeks certification as exclusive bargaining agent are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*, to whom the *Labour Relations Act* does not apply by virtue of section 2(f) thereof. This application must, accordingly, be and is hereby dismissed.

PARTIAL DISSENT OF BOARD MEMBER W. G. DONNELLY;

1. I agree with my colleagues' analysis of the relevant legislation in paragraphs 62 to 81 of the majority decision, and with the conclusion they express in paragraph 82. That unanimous conclusion is sufficient to dispose of this application, and makes determination of the applicant's trade union status unnecessary. I do not join in the majority's *obiter dicta* on that issue in paragraphs 38 to 61. If it were necessary to express any opinion on that issue, I would not agree that the applicant is a trade union.

1139-84-R;1140-84-R;1153-84-R Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (AFL-CIO-CLC), Applicant, v. United Food and Commercial Workers Union, Local 1000A, Respondent, v. **York County Quality Foods Ltd.**, Intervener

Collective Agreement — Practice and Procedure — Termination — Union Security — Voluntary Recognition — Food concessions operator at airport signing agreement with union which held bargaining rights for previous operator — Agreement ratified by employees — Whether sufficient recognition agreement meeting requirements of section 60 — Whether first collective agreement including union security clause void under section 46(4) — Respondent union not required to file evidence of membership to satisfy section 60 or section 46(4) before hearing

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

***APPEARANCES:** Alick Ryder, Q.C. and T. Rees for the applicant; D. I. Wakely, Carl Peterson, John Bitove and Tom Bitove for the company; Paul Cavalluzzo and Dan Gilbert for Local 1000A.*

DECISION OF THE BOARD; September 6, 1984

1. These are two applications for a declaration terminating bargaining rights, and on the assumption that they succeed, an application for certification. All three applications are filed by Local 88 of the Canadian Union of Restaurant and Related Employees, with a view to replacing Local 1000A of the United Food and Commercial Workers Union as bargaining agent for the units of full-time and part-time employees who operate the food-service outlets at Pearson International Airport in Malton.

2. The contract from the Ministry of Transport for those food-service outlets had been held for a number of years by Cara Operations Limited, and the United Food and Commercial Workers Union was certified to represent its employees at the air terminal in 1981. Local 1000A, as the Local with jurisdiction in that area, was involved in the organizing drive and took over the bargaining rights (and money paid) upon certification. It was Local 1000A who then negotiated and signed two-year collective agreements with Cara for each of a full-time and a part-time unit. Those collective agreements were ratified by both units of employees, and took effect in 1982.

3. The food-service contract at the airport came up for tender, however, in 1983, and in October it was announced by the Ministry that Cara had been outbid by York County Quality Foods Ltd. (hereinafter "York County Foods"). Local 1000A had the jobs of approximately 300 members at stake at that point, and in light of the decision of the Board in the analogous case of *Metropolitan Parking Ltd.*, [1979] OLRB Rep. Dec. 1193 (denying the existence of "successor rights" in such situations), Dan Gilbert, the Local's President, immediately entered into discussions with the members, with Cara, and with various area politicians about what could be done. As one of the letters sent to the members put it:

**TO: ALL BARGAINING UNIT EMPLOYEES,
CARA OPERATIONS RESTAURANT DIVISION,
TORONTO INTERNATIONAL AIRPORT**

Greetings:

By now, you are aware of the likely possibility, as printed in the Toronto Star, that Cara Operations Ltd. has lost the operating contract for the Food and Beverage concessions at Toronto International Airport.

The Union and Cara have not yet received official notification from the Federal Government that York County Quality Foods Ltd. is the successor operator but in all probability, it will be factual. The Union will do its utmost, in an endeavour to protect the jobs of all of the members, as well as retaining the Bargaining Rights for them.

You will be advised of further details, as they become available.

Fraternally yours,

"D. Gilbert"

Dan Gilbert,
President.

Ultimately, Mr. Gilbert approached the successful bidder, York County Foods, to discuss the prospects of retaining his members in their current employment, and of negotiating a collective agreement with Local 1000A to cover them. Mr. Gilbert at the same time delivered to York County Foods copies of the current collective agreements between Local 1000A and Cara. York County Foods proved receptive to Mr. Gilbert's suggestion, and negotiations began in earnest in November. Mr. Gilbert kept his members informed of what was taking place, and on January 11, 1984, the day before York County Foods was to take over the operations from Cara, included a Memorandum of Settlement for a new collective agreement with York County Foods, to be effective without hiatus from the moment York County Foods took over the operations and the employment of Local 1000A's members. It was expressly understood in the Memorandum, however, that acceptance of the new collective agreement was subject to ratification by the members. The agreements themselves contained certain forms of "concessions", including a freeze on wages and benefits, and lower rates for new hires.

4. The records of Local 1000A confirm that all former employees of Cara were, in accordance with the Union Security provisions of the Cara agreements, members of Local 1000A, and these made up 180 of the 223 full-time employees engaged by York County Foods when it commenced operations on January 12th, and 37 of the 48 part-time employees. Notice of two ratification meetings (to cover shifts) was given by Local 1000A for January 19th, the purpose of the meeting being clearly set out as: "Business-Ratification of Memorandum of Agreement". Both units of employees ratified their respective collective agreements at these meetings. The employer was then duly notified in writing of this, and on January 23, 1984, formal collective agreements were signed by the parties. It is these two collective agreements which the applicant, Local 88, now seeks to set aside, under the provisions of section 60(1) of the Act, in order to clear the way for its own application for certification.

5. Section 60(1) of the Act provides:

Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

The applicant argues that because the collective agreement voluntarily entered into between Local 1000A and York County Foods contains a provision (as it does) requiring, as a condition of employment, membership in the trade union that is party to the agreement, it is the requirements of section 46(4) of the Act which, in this application, must be met. Section 46(4) provides:

A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply,

- (a) where the trade union has been certified as the bargaining agent of the employees of the employer in the bargaining unit; or
- (b) where the trade union has been a party to or bound by a collective agreement with the employer for at least one year;

• • •

The applicant argues that Local 1000A must therefore demonstrate that it “established” *for the employer* at the time these collective agreements were entered into that it in fact had as *members* the required majority of the bargaining units, and that the majority required was *not less than 55 per cent*. The applicant argues further that Local 1000A was not entitled to rely on the evidence of memberships arising out of the prior Cara agreements, as those memberships were themselves the product of a compulsory membership clause in a voluntary-recognition agreement, the *International* having been the trade union party to the certification application (and in whose name cards had been signed), and Cara having voluntarily agreed to accept the transfer of bargaining rights to Local 1000A. The applicant argues, finally, that all evidence of membership relied upon herein by Local 1000A had to be filed with the Board not later than the “terminal date” fixed for these applications, pursuant to the provisions of section 73 of the Board’s Rules of Practice. The applicant, in conclusion, urges the Board to be vigilant in dealing with voluntary-recognition situations such as these, and not allow the *employer* to select at random who the bargaining agent for its employees will be, nor to dictate, in return for voluntary recognition, what the terms of a collective agreement will be. The applicant indicated to the Board that its only interest in these proceedings was to challenge,

in the words of counsel, “a collective agreement in which the employees themselves were not involved”.

6. The Board can readily imagine scenarios where the concerns expressed by the applicant would have meaning (and that is the whole purpose of section 60). The present scenario, however, is not one of them. Here the bargaining agent was *not* selected at random by the employer. Local 1000A is the very bargaining agent who *already* represented the employees of these food outlets in collective bargaining. Because of the “tender” process, the only newcomer on the scene was the corporate employer, and Local 1000A set about, not unreasonably, to confirm the continuation of both the employment of its members and its own bargaining rights. One can easily contemplate the employees’ worst fears at the time that the loss of Cara’s contract was announced, and we have no difficulty believing the evidence of Mr. Gilbert that he was in contact with his members and keeping them informed of his efforts throughout the course of his dealings with the successful bidder, York County Foods. And, while the terms of the proposed collective agreements were agreed to be effective as of January 12th, so that no hiatus occurred in the rights of employees under the Cara and York County Foods agreements, final agreement was nonetheless expressly made subject to ratification by the employees themselves. That ratification was arranged to take place within a week, after notice was duly given to all of the employees in the proposed bargaining units. The applicant draws to the Board’s attention the fact that no figures are given for the attendance or votes at the ratification meetings, so as to permit the Board to be satisfied that the votes in favour of the contracts represented a “majority” of the employees in the bargaining units. The applicant purports to represent, however, a number of employees in these bargaining units, and tendered no evidence whatever of a lack of adequate notice with respect to those meetings. In the circumstances, the Board is fully prepared to treat the ratification result, after full opportunity to attend and vote has been afforded, as indicative of the will of the “majority” (we would note that this is consistent with the Board’s own statutory procedures for certification after a vote in section 7(3) of the Act), and we are satisfied that the collective agreements in question meet the test of section 60.

7. This case in fact has many parallels with the case of *Gilbarco Canada Ltd.*, [1971] OLRB Rep. March 155, cited by counsel for Local 1000A. There the challenged trade union tendered no “membership evidence” at all, but had, like here, openly involved the employees in the proposed bargaining in each step of its dealings with the employer, including final ratification of the collective agreement. The Board wrote:

16. While the applicant submitted that there were deficiencies in the membership evidence of the Gilbarco employees’ Union, we are of the opinion that the requirements of section 45a [now section 60] of The Labour Relations Act, do not require membership. Section 45a speaks of representation as opposed to section 7 of the Act which refers to membership. *The Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local 117 v. The Canadian Plasterers’ Union v. Toronto Plastering Company Limited* 1967 December, OLRB Mthly. Rep. 879 at 891. Accordingly, in assessing applications under section 45a the requirements of membership which obtain in applications for certification do not obtain although membership may be some evidence of representation.

17. In this case a majority of the employees attended meetings where they

set up the Gilbarco Employees' Union, and they attended meetings where they discussed the bargaining relationship and ratified a proposed collective agreement. In the face of those facts we can only conclude that the Gilbarco Employees' Union at all material times represented the employees at Brockville.

The Board then went on to say:

18. There is a further ground for rejecting this application which flows from equity. The function of section 45a is to protect employees by enabling this Board to set aside collective agreements entered into by a trade union and an employer in a situation where the trade union does not represent the employees. The section envisions protecting the rights of employees to join a trade union of their own choice and to have their chosen trade union represent them in collective bargaining. In this case the employees freely and actively selected a trade union to represent them and participated in the procedures leading to the signing of a collective agreement. In our view section 45a is not intended to protect the employees in this type of situation. There is no evidence of any misrepresentation or fraud which induced these employees to set up the Gilbarco Employees' Union and to ratify the collective agreement.

19. The facts of this case clearly demonstrate that the employees have held out to the company a trade union that they put forth as a duly constituted trade union and have induced the company to enter into a collective agreement with that trade union. It is also relevant that the collective agreement which was entered into is not only binding upon the employer and the trade union, but it is also binding upon the employees in the bargaining unit defined in the agreement.

We consider these latter comments appropriate to the case at hand as well.

8. With respect to section 46(4), that section has long been a part of the Act, and constitutes a wholly different issue from that raised by an application under section 60 of the Act. The applicant would argue, however, that section 46(4) provides another basis upon which the present collective agreement should be set aside, in light of the words in the section that:

"A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes . . ."

This means, the applicant submits, that an improperly negotiated "compulsory membership" clause is not severable from the rest of the collective agreement: the whole agreement falls. This, the applicant submits, is as it should be, since the Union Security provision cannot be separated from the rest of the "package" on the table.

9. The Board is prepared to assume, without deciding, that this issue is properly before us in the present proceedings, that the applicant would have the status to complain about this matter, and that the whole collective agreement would necessarily fall with the Union Security provision. What we find, in any event, is that Local 1000A fairly "established" to the employer at the time the present agreement was entered into that it had as members well in excess of

55 per cent of the proposed bargaining units. The employer knew that it was staffing its operation for the most part with the existing Cara employees, and was provided with copies of the applicable collective agreements, by the terms of which all employees of Cara were required to be members of Local 1000A. Whether or not those collective agreements can properly be regarded as “voluntary” because of the transfer of jurisdiction from the International to the Local (which we doubt), those collective agreements were more than a year old, and therefore no longer subject to challenge under the provisions of section 46(4). York County Foods had no other reason to go behind the face of those collective agreements, and indeed, none has been shown to us.

10. The applicant has referred us to the decision of the Board in *Dellelce Construction*, [1971] OLRB Rep. Dec. 778. That case, however, was a termination application under what is now section 60. The fact that the incumbent trade union gave applications for membership to the employer for signature by the employees was irrelevant: that took place *after* the collective agreement in dispute had been consummated, and could not have assisted the incumbent in demonstrating that it represented a majority “at the time that the collective agreement was entered into”. What caused the agreement to be abrogated by the Board in that case was the fact that the trade union party to it had dealt with only a small “committee” of employees in taking its mandate, and, in direct contrast to our own case, had gone to the general body of employees only after consummation of the collective agreement, to explain its terms, and not for ratification. The Board in the present case feels no compulsion, contrary to the submission of the applicant, to “save” the employees in these bargaining units from a collective agreement which they had every opportunity to accept or reject.

11. The final point for decision is the applicant’s contention that any “evidence of membership” upon which Local 1000A relies was required by section 73 of the Rules to be filed with the Board prior to the “terminal date”. The section provides:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

• • •

While the Rule does refer to applications for a declaration terminating bargaining rights as well as applications for certification, it would appear to be termination applications filed under section 57 which are contemplated. Applications under section 60, for example, do not, as the Board has noted, require the filing of "evidence of membership" at all, although that may in fact occur in a given case. More importantly, the concept of a "cut-off" date for the filing of evidence of employee wishes would appear to have meaning only in cases where ongoing campaigns are a material possibility. Under section 60, the relevant evidence is determined as of the date the impugned collective agreement was entered into. The same can be said for section 46(4), which, in addition, as the applicant has noted, appears to impose the requirement of satisfying not the Board but the *employer* that the requisite majority was held as of the time the collective agreement was entered into. Consistent with this analysis, we note that the Board has never in applications under section 60 of the Act required the filing of "evidence of membership", if such is relied upon, at any time prior to the hearing, and, with respect to section 46(4), that the normal means of ensuring compliance with that section would be by way of unfair labour practice complaints, for which no terminal date is prescribed.

12. For the foregoing reasons, the two applications for a declaration terminating bargaining rights are dismissed. And owing to the existence of Local 1000A's collective agreement, the application for certification is untimely and is dismissed as well.

13. In light of an earlier application for certification which was withdrawn and the present application, Local 1000A has requested that a dismissal on this occasion be accompanied by a bar. In the circumstances before us, the normal practice would not be to impose a bar, but rather to deal with the issue as a request not to entertain should a further application be filed. In view of the findings in these applications, however, and the affirmation of a contract bar, it appears to the Board that the issue is academic.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

2627-83-R: Labourers' International Union of North America, Local 1089, (Applicant) v. Oak Valley Contractors Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

0357-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Delta Interior Systems, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Operative Plasterers and Cement Masons' International Association, Local 124, (Intervener #2).

Unit: "all employees of the respondent in other than the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit). (*Clarity Note*).

0359-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. D'Angelo Plastering Co. (1983) Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Operative Plasterers and Cement Masons' International Association, Local 124, (Intervener #2).

Unit: "all employees of the respondent in other than the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (26 employees in unit). (*Clarity Note*).

0360-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. S & D Giamberardino Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Operative Plasterers and Cement Masons' International Association, Local 124, (Intervener #2).

Unit: "all employees of the respondent in other than the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit). (*Clarity Note*).

0673-84-R: United Steelworkers of America, (Applicant) v. W. A. Coleman Metal Products Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (59 employees in unit).

0684-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Board of Management of the Guild, (Respondent).

Unit #1: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and pending the resolution of the status of these categories excluding as well the Head Bartender, Assistant Housekeeper, Night Sous Chef and 1st Sous Chef." (132 employees in unit).

Unit #2: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, head bartender, 1st sous chef, office clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (58 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0751-84-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. ill limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (261 employees in unit). (*Having regard to the agreement of the parties*).

0945-84-R: Ontario Nurses' Association, (Applicant) v. The Donwood Institute, (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in Metropolitan Toronto, Ontario, save and except the department heads, persons above the rank of department head, team leader inpatients services, and persons regularly employed for not more than twenty-four (24) hours per week." (36 employees in unit).

0952-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Uniflex Packaging of Canada Limited and Formula Plastics Inc., (Respondents) v. Formula Plastics Inc., (Objectors).

Unit: "all employees of the respondent Uniflex Packaging of Canada Limited in the City of Mississauga, save and except foremen, persons above the rank of foreman, technical staff, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (35 employees in unit).

0964-84-R: Local 2104 Union of Bank Employees (Ontario) Canadian Labour Congress, (Applicant) v. Welland Area Civic Employees Credit Union, (Respondent).

Unit: "all office and clerical employees of the respondent in Welland, Ontario, save and except manager and those above the rank of manager." (3 employees in unit). (*Having regard to the agreement of the parties*).

0971-84-R: United Employees of Hall Engineering Ltd., (Applicant) v. Hall Engineering (Ont.) Ltd., (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

0982-84-R: Retail, Wholesale & Department Store Union AFL-CIO-CLC, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: "all employees of the respondent at its retail store at 25 The West Mall, in the City of Etobicoke, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university." (187 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week at 25 The West Mall in the City of Etobicoke, save and except department supervisors, persons above the rank of a department supervisor, security staff, management trainees, office and clerical staff, students employed during the school vacation period and students on a co-operative program with a school or university." (237 employees in unit). (*Having regard to the agreement of the parties*).

0986-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. William Neilson Ltd., (Respondent).

Unit: "all employees of the respondent working at its ice cream distribution centre in Ottawa, Ontario, save and except foremen those above the rank of foreman, clerical, office and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

0990-84-R: Association of Professional Student Service Personnel, (Applicant) v. The Halton Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent engaged as speech pathologists, child care workers, psychometrists, psychologists, social workers and attendance counsellors in the Regional Municipality of Halton, save and except superintendents and persons above the rank of superintendent." (10 employees in unit). (*Having regard to the agreement of the parties*).

0991-84-R: United Food & Commercial Workers, Local 409, (Applicant) v. S. S. Kresge Company (a Division of K-mart Canada Limited), (Respondent).

Unit: "all employees of the respondent employed at 250 River Road in the City of Thunder Bay, Ontario, save and except the food department manager, assistant store manager, store manager and persons above the rank of store manager." (21 employees in unit). (*Having regard to the agreement of the parties*).

0996-84-R: Service Employees International Union, (Applicant) v. Flamboro Downs Holdings Limited, (Respondent).

Unit: "all employees of the respondent employed in the mutuels department at Flamboro Downs racetrack at Dundas, Ontario, save and except head cashiers, supervisors, assistant managers, persons above the ranks of head cashier, supervisor and assistant manager, data processing operators and office and sales staff." (95 employees in unit). (*Having regard to the agreement of the parties*).

0997-84-R: United Steelworkers of America, (Applicant) v. Hunter Drums Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Burlington, save and except foremen, those

above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (32 employees in unit). (*Having regard to the agreement of the parties*).

1003-84-R: Ontario Public Service Employees Union, (Applicant) v. The Children’s Aid Society of Northumberland, (Respondent).

Unit: “all employees of the respondent in the County of Northumberland, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation year.” (13 employees in unit). (*Having regard to the agreement of the parties*).

1025-84-R: Ironworkers District Council of Ontario, (Applicant) v. G.C. Stage Equipment Ltd., (Respondent).

Unit #1: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all ironworkers and ironworkers’ apprentices in Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1031-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Gareth Brash Contracting, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1033-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. S. McNally and Sons Limited, (Respondent).

Unit: “all truck drivers in the employ of the respondent in the construction industry in the Regional Municipality of Hamilton Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

1035-84-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. H. J. Voth and Sons Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

1045-84-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, Lambton Twilight Haven Home for the Aged, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at the Town of Petrolia save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements." (136 employees in unit).

Unit #2: "all employees of the respondent at the town of Petrolia regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements." (70 employees in unit).

1058-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Corporaton of the City of Toronto, (Respondent) v. Metropolitan Toronto Civic Employees' Union, Local 43 C.U.P.E., (Intervener).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices and welders in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement with the intervener." (31 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices and welders in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement with the intervener." (31 employees in unit).

1059-84-R: United Steelworkers of America, (Applicant) v. Teledyne Canada Limited, (Respondent).

Unit: "all employees of the respondent in its Harfac-McKay Division in the Municipality of Metropolitan Toronto save and except foremen, those above the rank of foreman." (7 employees in unit). (*Having regard to the agreement of the parties*).

1078-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Apex Woodworking Company Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (20 employees in unit).

1080-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Weston Excavating & Grading Company Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those

primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1120-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Sonterlan Construction Corporation, (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employee in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employee in unit).

1146-84-R: Ontario Nurses’ Association, (Applicant) v. Beacon Hill Lodges of Canada, Thunder Bay, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Thunder Bay, save and except the director of nursing and persons above the rank of director of nursing.” (9 employees in unit). (*Having regard to the agreement of the parties*).

1157-84-R: Canadian Paperworkers Union, (Applicant) v. Total Graphics Limited, (Respondent).

Unit #1: “all employees of the respondent at Peterborough, Ontario save and except supervisors, persons above the rank of supervisor, office, office-cleaning and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students employed on a co-operative training program with the Peterborough County Board of Education.” (54 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at Peterborough, Ontario save and except supervisors, persons above the rank of supervisor, office, office-cleaning and sales staff, and students employed on a co-operative training program with the Peterborough County Board of Education.” (2 employees in unit). (*Having regard to the agreement of the parties*).

1179-84-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Global Interiors of Canada Ltd., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1191-84-R: Schneider Employees’ Association, (Applicant) v. Link Services Inc., (Respondent).

Unit: “all employees of the respondent employed at and out of its facilities in the Municipality of Metropolitan Toronto, save and except assistant supervisors, persons above the rank of assistant supervi-

sor and office and sales staff.” (14 employees in unit). (*Having regard to the agreement of the parties*).

1211-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Dan Grady Plumbing Ltd., (Respondent).

Unit #1: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

Unit #2: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the County of Peterborough (except for the Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

1229-84-R: Local 47 Sheet Metal Workers’ International Association, (Applicant) v. Michael Potter Roofing, (Respondent).

Unit #1: “all roofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all roofers in the employ of the respondent in The Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

1231-84-R: Labourers’ International Union of North America, Local 1081, (Applicant) v. Siesta Masonry, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1241-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Everingham Brothers Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the City of Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (109 employees in unit). (*Having regard to the agreement of the parties*).

1260-84-R: Labourers’ International Union of North America, Local 506, (Applicant) v. A. D. A. M. Holdings, Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan

Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

BARGAINING AGENTS CERTIFIED SUBSEQUENT TO A PRE-HEARING VOTE

0743-84-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Sunnybrook Foods Limited, (Respondent) v. Local 206, National Council of Canadian Labour, (Intervener).

Unit: "all employees of the respondent in its stores in Ontario regularly employed for not more than twenty-eight (28) hours per week and students employed during the Easter vacation, the Christmas vacation or the period of May 14th to September 17th inclusive, save and except department managers, porters, and head office and warehouse staff." (78 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		78
Number of persons who cast ballots	58	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		35
Number of ballots marked in favour of intervener		22

0380-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Valhalla Inn, (Respondent).

Unit: "all employees of the respondent at Kitchener, save and except supervisors, those above the rank of supervisor, front desk, office and sales staff, those persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (152 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		100
Number of persons who cast ballots	75	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		38
Number of ballots marked against applicant		34
Ballots segregated and not counted		1

0604-84-R: The Canadian Union of Public Employees, (Applicant) v. The Children's Aid Society of Owen Sound and the County of Grey, (Respondent).

Unit: "all employees of the respondent in the County of Grey in the Province of Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Confidential Secretary to the Director, Supervisors and persons above the rank of Supervisor." (4 employees in unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		1

0650-84-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Caravan Trailer Rental Company Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent in the Town of Halton Hills, Ontario, save and except foremen,

persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		14

0669-84-R: The Canadian Union of Public Employees, (Applicant) v. Queensway-Carleton Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers Local 111, (Intervener).

Unit: "all employees of the respondent employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, undergraduate nurses, graduate and undergraduate pharmacists, graduate and student dietitians, technical and professional personnel, office and clerical staff, supervisors and persons above the rank of supervisor, and persons covered by subsisting collective agreements." (57 employees in unit).

Number of names of persons on revised voters' list		108
Number of persons who cast ballots	36	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		0
Ballots segregated and not counted		12

0747-84-R Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Bombay Palace Restaurant Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent 71 Jarvis Street, Toronto, Ontario, save and except controller, persons above the rank of controller, office and sales staff, and persons regularly employed for not more than 24 hours per week." (22 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant		5
Ballots segregated and not counted		5

APPLICATIONS FOR CERTIFICATION DISMISSED — NO VOTE CONDUCTED

1654-83-R: United Brotherhood of Carpenters & Joiners of America Local 1256, (Applicant) v. Letham, Jarvela and Robertson Ltd., (Respondent). (3 employees in unit).

3100-83-R: Service Employees International Union, (Applicant) v. CNIB Caterplan Services, (Respondent). (88 employees in unit).

0691-84-R: United Steelworkers of America, (Applicant) v. 237920 Manufacturing Ltd., 237906 Manufacturing Ltd. and 387025 Ontario Ltd., carrying on business as Triflex Displays, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (42 employees in unit). (*Having regard to the agreement of the parties*).

0995-84-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent). (26 employees in unit).

1050-84-R; 1051-84-R: London and District Service Workers' Union, Local 220, (Applicant) v. Kitchen-Waterloo Hospital, (Respondent). (211 employees in unit).

1150-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Seeburn Metal Products Limited, (Respondent) v. Employees Association of Seeburn Metal Products Limited, (Intervener). (272 employees in unit).

APPLICATIONS FOR CERTIFICATION DISMISSED SUBSEQUENT TO A PRE-HEARING VOTE

0954-84-R: International Molders & Allied Workers Union, (Applicant) v. Quadrant Industries Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (41 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	41	
Number of persons who cast ballots	38	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant	26	
Ballots segregated and not counted		1

APPLICATIONS FOR CERTIFICATION DISMISSED SUBSEQUENT TO A POST-HEARING VOTE

1973-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Sternson Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the City of Brantford save and except supervisors, those above the rank of supervisor, the executive secretary to the vice-president of research and development, the executive secretary to the vice-president of manufacturing, salesmen, comptroller, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements." (32 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		15

2516-83-R: The International Brotherhood of Painters and Allied Trades Local 1824, (Applicant) v. Waterloo Glass & Mirror Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality

of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman.”

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		5

0868-84-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. Goodall Rubber Company of Canada, Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Collingwood, save and except foremen, persons above the rank of foreman, office and sales staff.” (17 employees in unit). (*Having regard to the agreement of the parties*).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0991-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. K & S Plumbing and Heating Limited, (Respondent).

1014-84-R: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Aurora, (Respondent).

1024-84-R: Labourers’ International Union of North America, Local 1059, (Applicant) v. Omega Contractors, (Respondent).

1036-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Highvalley Landscaping & Contractors Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

1046-84-R: The International Union of Operating Engineers, Local 796, (Applicant) v. Victory Soya Mills Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101, (Intervener).

1119-84-R: Labourers’ International Union of North America, Local 607, (Applicant) v. Stebill Construction, (Respondent).

1149-84-R: Seafarers’ International Union of Canada, (Applicant) v. Owen Sound Transportation Company, (Respondent).

1217-84-R: The Canadian Union of Representatives and Employees, (Applicant) v. United Food & Commercial Workers International Union, (Respondent).

1230-84-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Simpsons Limited, (Respondent).

1277-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Wil-Mat Holdings Ltd., (Respondent).

1339-84-R: Hotels, Clubs, Restaurants & Taverns Employees' Union Local 261, (Applicant) v. The Mill Dining Lounge, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0197-84-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Doran Construction Limited, Taggart Construction Limited and Taggart General Contractors Limited, (Respondents). (*Dismissed*).

SALE OF A BUSINESS

United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Doran Construction Limited, Taggart Construction Limited and Taggart General Contractors Limited, (Respondents). (*Granted*).

1156-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. V.I.P. Vacuum Industrial Pollution Industrial Inc., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3134-83-R: Richard T. Foskett, (Applicant) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593, (Respondent) v. Woodcroft Mechanical Ltd., (Intervener).

Unit: "all certified journeymen and apprentices employed by the respondent as a plumber, steamfitter, pipefitter, welder and apprentice thereof, or job foreman in the industrial, commercial and institutional sector of the construction industry in Ontario." (2 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

0535-84-R: Muriel Elizabeth Peters, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. The Simcoe County Board of Education, (Intervener) v. Employee, (Objector). (274 Employees in unit). (*Dismissed*).

0622-84-R: Raymond C. O'Connell, Janet Zeldenrust, and Peter Padbury, (Applicant) v. Graphic Communications International Union, (Respondent) v. Standard-Freeholder, a division of Canadian Newspaper Company Limited, (Intervener). (16 employees in unit). (*Dismissed*).

0704-84-R: Dennis Labadie, (Applicant) v. Sheet Metal Workers' International Association, Local 235, and Ontario Sheet Metal Workers' Conference, (Respondents) v. Tradesmen Fabricating Ltd., (Intervener).

Unit: "all certified journeymen and sheet metal workers or registered apprentices, as well as sheeter/decker, welder, sheeters' assistant and material handler engaged in the sheeting and decking segment of the sheet metal industry, and all probationary employees recognized by the Local Union and employed

in the shop or on the job site except as otherwise specifically provided in the collective agreement in the Province of Ontario.” (1 employee in unit). (*Dismissed*).

0705-84-R: Andy Peris, (Applicant) v. Service Employees Union, Local 183, (Respondent) v. Quintech, Division of Lab-Volt Limitee, (Intervener).

Unit: “all employees of the intervener at Belleville, Ontario, save and except managers, persons above the rank of manager, office and clerical and technical staff.” (7 Employees in unit). (*Granted*).

Number of names of persons on revised voters’ list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		6

0863-84-R: Bramalea Limited Residential Management Employees, (Applicant) v. Labourers’ International Union of North America, Local 183, (Respondent) v. Bramalea Limited, (Intervener). (53 employees in unit). (*Withdrawn*).

0864-84-R: Fernando Goncalves, (Applicant) v. Labourers’ International Union of North America, Local 183, (Respondent) v. Canam Steelworks Inc., (Intervener). (24 employees in unit). (*Withdrawn*).

0917-84-R: Anees Khan, (Applicant) v. Hotel Employees’, Restaurant Employees’ International Union – Local 75, (Respondent) v. Oxford Development Group Ltd., (Intervener). (12 employees in unit). (*Granted*).

0920-84-R: Jurgen Hasse, Scott Jantz, Dale Lambert, Kim Sheffield, Tony Ritonja, (Applicants) v. International Union of Bricklayers and Allied Craftsmen, the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 23, (Respondent). (5 employees in unit). (*Dismissed*).

0926-84-R: Claudette Hunter, Paulette Tait, Jerry Fountain, Craig Crastchick, (Applicants) v. International Brotherhood of Teamsters, Local 938, (Respondent).

Unit: “all employees of Ackland’s Ltd. at Sudbury, Ontario, save and except foremen and supervisors, persons above the rank of foreman or supervisor, outside sales staff, confidential secretary, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (4 employees in unit). (*Granted*).

0932-84-R: Neville F. Bodsworth, (Applicant) v. United Brotherhood of Carpenters & Joiners of North America, Local Union 1669, (Respondent). (2 employees in unit). (*Withdrawn*).

0995-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent). (26 employees in unit). (*Dismissed*).

1299-84-R: Larry Snider, (Applicant) v. United Steel Workers of America, Local 1177, (Respondent).

Unit: “all employees of Port Colborne Block Limited in Port Colborne, Ontario save and except foremen, persons above the rank of foreman, office staff and students during the vacation period.” (3 employees in unit). (*Granted*)

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

0137-84-M; 0138-84-M: St. Raphael’s Nursing Home (Kitchener), (Employer) v. London & District Service Workers Union, Local 220, (Trade Union). (*Terminated*).

0546-84-M: Trenton Memorial Hospital, (Employer) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).

REFERRAL AS TO APPOINTMENT OF ARBITRATOR

0545-84-M: Victoria Hospital Corporation, (Employer) v. London & District Service Workers Union, Local 220, (Trade Union). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1138-84-U: Bird Construction Company Limited, (Applicant) v. Ron Dauphin, Labourers International Union of North America, Local 1036, and others listed in Schedule "A", (Respondents). (*Withdrawn*).

1164-84-U: Acme Building & Construction Limited, (Applicant) v. International Brotherhood of Electrical Workers, Local 1687 and Lou Popovitch, (Respondents). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2708-82-U: Allen McKinnon, P.R. #1664, (Complainant) v. Canadian Paperworkers Union, Local 90, (Respondent) v. Abitibi-Price Inc., Iroquois Falls Division, (Intervener). (*Dismissed*).

0573-83-U: Toronto Typographical Union, Local 91, (Complainant) v. Howarth & Smith, (Respondent). (*Withdrawn*).

1859-83-U: Fred Leimbrock, (Complainant) v. Sheet Metal Workers Union Local 30, (Respondent). (*Withdrawn*).

2372-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Hereditary Holdings Limited and Myriad Holding Corporation Limited, carrying on business as Evergreen Property Management, (Respondent). (*Withdrawn*).

2834-83-U: Ona Toth, (Complainant) v. Christian Labour Association of Canada, (Respondent) v. Medi Park Lodge Inc., (Intervener). (*Withdrawn*).

2836-83-U: John Bellenger, (Applicant) v. Toronto Motion Picture Projectionists' Union, Local 173 of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, (Respondent) v. Chuck Morrow, (Employee). (*Granted*).

2899-83-U: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Complainant) v. Manual DaSilva Foods Ltd., (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union AFL-CIO-CLC, Local 88, (Intervener). (*Withdrawn*).

3001-83-U: Service Employees' Union, Local 204, AFL-CIO-CLC, (Complainant) v. Heritage Nursing Home Inc., Daniel Glick and Len Glazer, (Respondents). (*Withdrawn*).

3072-83-U: Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Alltour Marketing Support Services Limited and Pro Staff Services Limited, (Respondents). (*Withdrawn*).

3108-83-U: Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Alltour Marketing Support Services Limited, (Respondent). (*Withdrawn*).

0304-84-U: International Union of Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Circle "C" Fabricating Limited, (Respondent). (*Withdrawn*).

0323-84-R: The Canadian Union of Public Employees and its Local 1582, (Applicant) v. The Metropolitan Toronto Library Board, (Respondent). (*Withdrawn*).

0323-84-R The Canadian Union of Public Employees and its Local 1582, (Applicant) v. The Metropolitan Toronto Library Board, (Respondent). (*Withdrawn*).

0340-U: United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Circle "C" Fabricating Limited, (Respondent). (*Withdrawn*).

0389-84-U: Ontario Public Service Employees Union, (Complainant) v. Greater Welland Ambulance Service Ltd., (Respondent). (*Granted*).

0435-84-U: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainants) v. Romac Industries, (Respondent). (*Withdrawn*).

0542-84-U: The Canadian Union of Public Employees, (Complainant) v. Halton Roman Catholic Separate School Board, (Respondent). (*Dismissed*).

0615-84-U: Dimitrios Kanavas, (Complainant) v. International Brotherhood of Electrical Workers, Local Union 353, (Respondent). (*Dismissed*).

0624-84-U: Kenrick Vincent Bruzal, (Complainant) v. International Assn. of Machinists (Local Lodge No. 2113) and Aerospace Workers, (Respondent) v. Ford Electronics Manufacturing Corporation, (Intervener). (*Withdrawn*).

0644-84-U: Energy and Chemical Workers Union, (Complainant) v. Petro-Canada Products, (Respondent). (*Withdrawn*).

0766-84-U: The Canadian Union of Public Employees, (Complainant) v. Halton Roman Catholic Separate School Board, (Respondent). (*Dismissed*).

0799-84-U: Roger Courtemanche, (Complainant) v. Les Senior, (Respondent). (*Withdrawn*).

0807-84-U: Toronto Typographical Union, Local 91, (Complainant) v. Howarth & Smith Limited, (Respondent). (*Withdrawn*).

0808-84-U: Local 280 Bartenders' and Beverage Dispensers' of H.E.R.E. International Union, (Complainant) v. Pine Tree Tavern, (Respondent). (*Withdrawn*).

0811-84-U: Southern Ontario Newspaper Guild, (Complainant) v. MacLean's Magazine, (Respondent). (*Dismissed*).

0838-84-U: Vito Luciano, (Complainant) v. Local 444, United Automobile, Aerospace and Agricultural Implement Workers of America, (Respondent) v. Chrysler Canada Ltd., (Intervener). (*Dismissed*).

0841-84-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. O. Browne & Co. Ltd., Markham, Ontario, (Respondent). (*Withdrawn*).

0848-84-U: Don Whitelaw, (Complainant) v. Overland Express, (Respondent). (*Dismissed*).

0858-84-U: Energy & Chemical Workers Union, Local 819, (Complainant) v. Nacan Products Limited Toronto, (Respondent). (*Withdrawn*).

0889-84-U: Black Diamond Cheese Employees Independent Union Affiliated to Energy and Chemical Workers Union, (Complainant) v. Black Diamond Cheese, Division of Brooke Bond Inc., (Respondent). (*Withdrawn*).

0902-84-U: Joseph S. Wojtowicz, (Complainant) v. Joe Dewitt of Local 95, (Respondent). (*Dismissed*).

0914-84-U: Merle Gunnes, (Complainant) v. Service Employees Union Local 204, (Allen Edge), (Respondent). (*Withdrawn*).

0921-84-U: Burns Meats Ltd., (Complainant) v. United Food and Commercial Workers International Union and the United Food and Commercial Workers International Union, Local 139, (Respondents). (*Granted*).

0924-84-U: The Draftsmen's Association of Ontario Local 164, (Complainant) v. Frankel Steel Limited, (Respondent). (*Withdrawn*).

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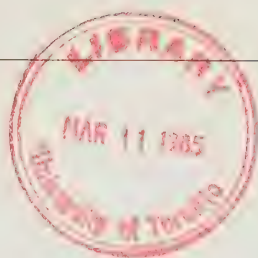


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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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*ONTARIO LABOUR RELATIONS BOARD
REPORT*

DRAFT OF THE OCTOBER, 1984 ISSUE

Ontario Labour
Relations Board,
400 University Avenue,
TORONTO, Ontario.
M7A 1V4

0188-84-M International Union of Bricklayers and Allied Craftsmen, Local Union No. 9, Applicant, v. **The Brant County Board of Education**, Respondent

Construction Industry — Construction Industry Grievance — Evidence — Respondent hiring tradesmen other than own employees to work on building owned by it — Whether acting as owner or employer operating business in construction industry — Whether constituting “subcontracting” — Extrinsic evidence as to negotiating background permitted where language ambiguous and two possible interpretations

BEFORE: Paula Knopf, Vice-Chairman, and Board Members H. Kobryn and J. A. Ronson.

APPEARANCES: *B. Fishbein, T. Odham, D. DeMonte for the applicant; J. A. Baker and J. Saldarelli for the respondent.*

DECISION OF PAULA KNOPF, VICE-CHAIRMAN, AND BOARD MEMBER, H. KOBRYN; October 24, 1984

1. The applicant Union and the respondent Brant County Board of Education (hereinafter referred to as the Board of Education) are bound by the Provincial Collective Agreement covering Bricklayers and Allied Craftsmen. By an agreed statement of fact filed at the outset of these proceedings, the parties were able to set forth the factual background that gives rise to this case as follows:

- (1) As a result of decisions and certificates of the Ontario Labour Relations Board dated August 18, 1983, certifying the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen as the bargaining agent of all bricklayers and bricklayers apprentices, save and except non-working foremen and persons above the rank of non-working foreman, in the employ of the Brant County Board of Education (“the Employer”) in the Province of Ontario in the industrial, commercial and institutional sector of the construction industry and in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, the Employer and the International Union of Bricklayers and Allied Craftsmen, Local 9 (“Local 9”) both became bound to the Provincial Collective Agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario (“the Provincial Collective Agreement”).
- (2) The Employer gave a contract for the performance of exterior masonry elevations for the overhanging library at Brantford Collegiate, Brant Avenue, Brantford (involving the tearing down and rebuilding of deteriorated masonry) to Ontario Restoration Ltd., a company that is not bound by the Provincial Collective Agreement.
- (3) This was the subject of a grievance dated December 12, 1983 by Local

9 which alleged that the Employer's conduct was in violation of the Provincial Collective Agreement.

2. The alleged violation of the collective agreement concerns article 1(c) which reads:

Any Employer who is a party to this Agreement desirous of subcontracting any work encompassing the skills of Members of the Ontario Provincial Conference shall only subcontract same to a subcontractor who is bound by the Provincial Agreement with the Ontario Provincial Conference.

The applicant asserts that the respondent's "giving" of the contract of repair of masonry work amounted to a violation of article 1(c).

3. In addition to the agreed statement of facts, the applicant asked this Board to hear and consider extrinsic evidence of the negotiating history of the parties to the Provincial Agreement to illustrate their intentions and understanding with regard to the meaning of article 1(c). It was argued that there are two conflicting and possible interpretations of the clause and that it is therefore ambiguous. Thus, the extrinsic evidence should be accepted to reveal the intent of the parties to the agreement itself. Also, it was submitted that the extrinsic evidence would reveal a latent ambiguity as to the application of the clause to the facts at hand. The respondent strenuously argued against the introduction of the proposed evidence. It was submitted that the collective agreement and article 1(c) are clear and unambiguous. Further, it was submitted that the mere existence of two possible interpretations cannot lead to an ambiguity automatically or else extrinsic evidence would be admissible in every situation. Counsel for both parties made reference to the recent decision of the Ontario Court of Appeal in *Noranda Metals Industries and International Brotherhood of Electrical Workers*, (1984) 44 O.R. (2d) 529.

4. In the *Noranda Metals* case, the Court concluded that the clause in question was patently ambiguous and that an arbitration board was therefore entitled to resort to extrinsic evidence to assist in the ascertaining of the true intentions of the parties of the collective agreement. But the Court also affirmed that an arbitrator could resort to extrinsic evidence to determine whether there was a latent ambiguity or in applying the language of the collective agreement to the facts. The Court cited and affirmed the propositions established earlier in the case of *Leitch Gold Mines Limited et al. v. Texas Gulf Sulphur Company Inc. et al.*, (1969) 1 O.R. 469 at p. 524, 3 D.L.R. (3d) 161:

Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevance surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

Thus, the Court of Appeal in the *Noranda Metals* case at page 536 has condoned the utilization of the opportunity to explore evidence of the negotiation history to reveal a latent ambiguity and then clarify the meaning of collective agreements. This then assists in applying the language of the contract to the facts of the case.

5. The very question before this Board was the application of the language of article 1(c) to the facts of the case. There were at least two possible interpretations of that language which were being presented to the Board. Also, the language itself was ambiguous as to the meaning of the terms “employer” and “subcontracting” in the context of the collective agreement and the application of it to the facts. Therefore, the majority of this Board (J. A. Ronson dissenting) ruled that we would accept into evidence the extrinsic evidence offered by the union. That evidence was tendered through Danny DeMonte and Neil Fraser. They are the President of the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Executive Director of the Masonry Industry Employers’ Council of Ontario respectively. These organizations are the two parties to the collective agreement in question in this case and represent the union and the employer parties of the agreement respectively. Both men have been executives in their organizations and active in negotiations of the Provincial Agreement since its inception in 1972. They both expressed familiarity with the history and negotiation positions of their organizations over article 1(c) since 1972.

6. Their evidence was similar. They pointed out that their agreement covers various types of companies, ranging from specialty masonry contractors and subcontractors to developers, general contractors and companies or entities engaged only peripherally in construction that involves masonry. It was and is their understanding that their collective agreement operates so that anyone is considered an “employer” from whom it holds bargaining authority either through Ontario Labour Relations Board certification or voluntary recognition. This is regardless of whether that “employer” is actually acting on the job site as an owner, contractor or subcontractor. Then, when such an “employer” chooses not to employ its own personnel directly, but to hire people to do masonry work from outside its own employees, it is considered to be subcontracting work within the meaning of article 1(c) of the collective agreement.

7. Their evidence also established that the language of article 1(c) has been raised in negotiations by the union several times since 1972 and as recently within the last two sets of negotiations. In 1982, the clause was discussed together with all the other clauses in a clause by clause analysis of the entire agreement. No changes were made because the parties agreed that they both understood what is meant and that they intended it to operate as set out above. In the 1984 negotiations, the union requested that the language of article 1(c) be strengthened to better reflect its intent, but the Employers’ Council felt that this was not necessary. Although a change in the language was discussed at the table, when all the final positions were traded off, the parties again agreed, as part of the final package, that they both understood what the language meant and that no changes would be made.

ARGUMENT

8. The applicant’s main argument was that the intent of the negotiators of the Provincial Agreement ought to be respected by holding that aside from the fact that the respondent is admittedly bound by the collective agreement, its act of hiring bricklayers other than its own employees puts it in the position of an employer who is subcontracting work. Further, because this work was let to a company which is not bound by the Provincial Agreement, this amounts to a violation of article 1(c). The fact that the respondent does not regularly or consistently have employees involved in masonry work does not preclude it from being an employer in the construction industry. The union cited the following cases: *Tops Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583, *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587 (hereinafter referred to as *Kapuskasing 1*), *Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145 and *Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62.

Further, anticipating the respondent's argument, counsel for the applicant urged the Board not to feel itself bound by the decision of this Board in the case of *Kapuskasing Board of Education*, [1981] OLRB Rep. Mar. 300 (hereinafter referred to as *Kapuskasing 2*) because it was either wrongfully decided or distinguishable on its facts.

9. Arguing policy considerations, the union argued that unless the respondent is considered as an employer and bound by article 1(c) in this situation, any one could avoid the union protections intended by article 1(c) by simply avoiding the hiring of bricklayers directly. Finally, the union pointed out that the collective agreement on its face must intend "employer" to be companies in the position of the respondent because the title page to the Provincial Agreement identifies "the employer" as "the Masonry Industry Employers' Council of Ontario" (hereinafter referred to as MIECO). By virtue of section 145(4) of the *Labour Relations Act*, MIECO is statutorily obligated to bargain for and represent all persons bound by their agency designation, which includes the respondent by virtue of its certification. Thus, the word "employer" in article 1(c) ought to be read as synonymous with the respondent in the interpretation and application of the collective agreement to these facts.

10. The respondent stressed the application and the appropriateness of relying on the Board's earlier decisions in *Kapuskasing 1* and *Kapuskasing 2*. While *Kapuskasing 1* involved the certification of that Board of Education as a general contractor, that was because it was employing construction workers. In *Kapuskasing 2*, the Ontario Labour Relations Board held that although the Board of Education was still bound by the collective agreement and the certification, on the facts of that case it was not acting as an employer within the meaning of the collective agreement because it was not using its own employees. The respondent argues that it is the same situation in this case. Further, the *Kapuskasing* cases implicitly rely on the policy that the employer who was only peripherally involved in construction should be treated differently than a general contractor who would clearly be bound by article 1(c). Finally, with regard to the evidence of Messrs. DeMonte and Fraser, counsel for the respondent argued that the evidence established only that negotiations for both parties were concerned over the position of general contractors' rights in article 1(c) and not the position of owners. Further, the evidence did not answer the question of what is considered to be subcontracting. Therefore, it was submitted that the extrinsic evidence did not assist the Board in learning the intentions of the parties with regard to the fact situation before it.

DECISION

11. The threshold issue that must be determined is whether the respondent was acting as an "employer" in this case. Section 145(4) establishes that an "employer" in this sector of the construction industry is bound by the provincial agreement by virtue of certification or voluntary organization:

145.-(4) After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining

agency representing a provincial unit of employees in which the employer would have been included.

An “employer” in the construction industry is defined in section 117(c) as:

“employer” means a person *who operates a business in the construction industry*, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts; [emphasis added]

Therefore only an “employer” within the meaning of section 117(c) of the Act can be bound by the provincial agreement and article 1(c) in particular. Therefore, to be an employer in the construction industry, one must be operating a business in the construction industry. This Board has made it clear that an entity need not be primarily engaged in construction to be considered to operate in the construction industry. Thus, certificates were issued in the cases of *Tops Marina, supra*, *Kapuskasing 1, supra*, *City of Toronto, supra*, and *Municipality of Metropolitan Toronto, supra*. In addition, the Union was issued a certificate for the employees of this respondent and the Board considered that it was engaged in construction although construction was not its primary activity.

12. However, having once been recognized as an employer operating a business in the construction industry, does the respondent forever maintain that characterization? It certainly does not do so automatically. Depending on the nature of projects undertaken and one’s involvement in those projects, an entity can change from being the operator of a business in the construction industry and thus an “employer”, to be simply being an “owner” of property who purchase construction or masonry services. But on the basis of the evidence before this Board, we are bound to conclude that when engaged on the project in question the respondent must still be considered to be operating a business in the construction industry and thus, an employer bound by the provincial agreement. The facts put before this Board established that the respondent was certified in the summer of 1983 as an employer who was bound by the Provincial Agreement between the applicant and the Masonry Industry Employers’ Council of Ontario. Thus, it was recognized that as of that time, the respondent was operating a business in the construction industry. A short time later, the respondent let out a contract for the work that is now in question was to have masonry work performed on a building owned by the respondent. It is clear that this work falls within the scope of the provincial agreement and is construction or masonry work. thus, the respondent must be viewed as continuing to be engaged in the operation of the construction business by its contracting for the performance of masonry work. While the onus is upon the union, the weight of this evidence combines to persuade the Board, on the balance, that the respondent continues to be operating a business in the construction industry and was engaged in a project regarding work covered by the provincial agreement.

13. This evidentiary conclusion is to be distinguished from the situation where evidence can establish that an entity has changed its status from being an employer because it is operating a business in the construction industry to becoming simply an owner of property who is purchasing construction skills or services. That was the situation in the *Kapuskasing 2* case where the Board of Education was found to have become an “owner” rather than an “employer” within the meaning of the collective agreement. This distinction could be established, *inter alia*, by evidence regarding the nature of work being done, the respondent’s degree of control

over the project, the work, the materials and the manpower as well as its participation, if any, in the project in question. However, on the basis of the facts before this Board, we find it reasonable to conclude that the respondent was acting as an “employer” in that it was operating a business in the construction industry at all material times.

14. The next question that must be addressed is what is the right of an employer who wants to or needs to subcontract work encompassing the skills covered by the collective agreement. To answer this, one must first address what is meant by subcontracting in this agreement. The contract contains a union security provision in article 5 which sets out the employer’s obligation regarding the hiring of members of the union:

Union Security

(a) The Employer agrees to first hire members of the Local Union on projects within the territorial area of the Local Union,

(b) Should the Local Union be unable to supply the necessary number of Members when required the Employer shall have the right to hire Employees from another Local Union covered by this Agreement until Members of said Local Union become available.

However, should Members of the Local Union become available at any time during a regular work week, it is understood that out-of-town Employee(s) shall be allowed to complete the work week employment before being replaced by the local Employee(s).

(c) Should the Employers requirement still not be complied with he shall have the right to hire Employees from other sources, providing such Employees make application to become members of said Local Union prior to commencement of work.

(d) Transfer of Employees from one Employer to another shall only be by mutual agreement of the Parties to this Agreement.

(e) The hiring practices established in all Local Unions shall be defined in Appendix “C” which shall form part of this Collective Agreement.

15. Like most collective agreements, one of its obvious purposes is to define and protect union members by assuring them access to the work encompassed by the collective agreement. A subcontracting clause is then included in the collective agreement as an expansion of this job protection as it gives conditional rights to an employer to hire outside of the security clause. But, when an employer wants to hire outside of workers covered by the security clause, it is obligated to do so in accordance with article 1(c); that is, that it can only subcontract to a subcontractor who is also bound by the Provincial Agreement. Subcontracting must then be recognized as the awarding of a contract to perform work encompassed by the collective agreement by anyone not covered by the union security clause.

16. We recognize that this definition of subcontracting is not directly in accordance with the definition stated by this Board earlier in the *Kapuskasing 2* decision. In that case, the Board said at page 301; “Subcontracting involves the awarding of a secondary contract, whereby a

subcontractor undertakes to perform certain of the obligations previously assigned to a principal or prime contractor.” We are of the view that this statement was *obiter dicta* because the Kapuskasing Board of Education was found not to be an employer. Therefore, the question of subcontracting was not the real issue in that case as it is before us at this time.

17. Subcontracting as we have defined it above is in accordance with the evidence given as to the parties’ understanding of the meaning of article 1(c). The parties who drafted and negotiated this collective agreement understand article 1(c) to bind any employer who is subject to the collective agreement to abide by it whenever it contracts to have skilled work done by anyone other than those covered by article 5. We recognize that this interpretation was not understood or intended by the respondent to these proceedings. But be that as it may, the respondent is bound by the contract drafted by its agent on its behalf and must also be bound by the interpretation that that agent shared with the other party to the collective agreement. Thus, subcontracting is understood simply to be the hiring of anyone other than those covered by the collective agreement’s security clause.

18. We are now in a position to be able to apply the principles to the facts of this case. The respondent did not directly employ any of its own employees to work on this project, nor did it hire in accordance with the union security clause. It had the right under article 1(c) of the collective agreement to contract out the work, but that right brought with it the obligation to contract to a contractor who is bound by the provincial agreement. The respondent failed to let the work to a company which is bound by that agreement and thereby must be considered to be in violation of article 1(c). We are convinced that any other interpretation of article 1(c) would ignore the intentions of the parties as expressed by the language of the Provincial Agreement, the entire scheme of the agreement and article 5 in particular. Further, this was confirmed by the evidence of Messrs. DeMonte & Fraser.

19. Therefore the grievance is allowed. At the parties’ request, the Board shall remain seized with the issue of quantum, if any, of damages.

20. Board member J.A. Ronson dissents from the decision of the majority. His decision will be issued at a later date.

0119-84-U Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local No. 304, Complainant, v. Canada Trustco Mortgage Company, Respondent

Duty to Bargain in Good Faith — Unfair Labour Practice — Employer willing to discuss and sign collective agreement on its own terms — Insisting on terms equal to those contained in collective agreement at its only other unionized branch — Resisting any concessions in substantial areas — Employer entitled to consider insignificant size of unit in terms of its total operation — Hard bargaining not breach of bargaining duty

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

***APPEARANCES:** John McNamee for the complainant; Wallace Kenny and Robert Hiscox for the respondent.*

DECISION OF VICE-CHAIRMAN R. O. MacDOWELL, AND BOARD MEMBER F. W. MURRAY; October 29, 1984

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a breach of section 15 of the Act. The union complains that the respondent employer has failed to "bargain in good faith and make every reasonable effort to make a collective agreement". The employer replies that it has merely engaged in hard bargaining in pursuit of its own self-interest. It was, and remains, prepared to enter into a collective agreement on terms similar to those which the union has already accepted at its branch in St. Catharines.

2. This matter was litigated over some seven days, and by the end of the hearings (which consumed almost as much time as the bargaining process itself) the Board had before it a fairly complete account of the parties' bargaining conduct, including the details of their positions, the concessions made, the debates, and, in the union's case, its mounting frustration. We do not think that any useful purpose would be served by reviewing those details here. It will be sufficient to set out a general overview of the situation, and the parties' bargaining stance on several of the key items in dispute. With that background, we will turn to the issue which we must determine.

II

3. The complainant is an industrial union with roots in the brewing industry, where it has had longstanding collective bargaining relationships with all of the major producers. The respondent is a financial institution with more than 200 branches across Canada and over 6,000 employees. Only two of the respondent's branches are unionized. One of these branches is in St. Catharines and has about fifteen employees. The other branch is in Cambridge and has some twenty employees. In both branches, the complainant union is the employees' bargaining agent.

4. The union was certified to represent the employees at St. Catharines in July, 1982. Following certification, the parties engaged in negotiations and concluded a collective agree-

ment which ran from December, 1982, until December, 1983. There were no unfair labour practice allegations made in respect of the certification proceeding or the subsequent collective bargaining. The first agreement at St. Catharines was concluded without a strike.

5. The first St. Catharines agreement was not a terribly satisfactory one from the union's point of view. Apart from certain rudimentary provisions respecting union security, grievance procedures, and so on, it consisted largely of the employees' existing conditions, and the respondent's established employment policies, which were simply embodied in the terms of the written agreement. However, it was a first agreement at what was then the only branch represented by the union, and it represented an almost unprecedented incursion into the financial sector. It was a "foot in the door", and the union hoped to improve upon the agreement in the next round of negotiations.

6. In the fall of 1983, the union began to organize the employees at the respondent's Cambridge branch. In November, 1983, the union was certified to represent the part-time employees working at Cambridge. In January, 1984, the union was certified to represent a companion unit of full-time employees. By this time, of course, the parties were already bargaining for a renewal of the agreement covering the St. Catharines branch.

7. The history of bargaining at St. Catharines helped to clarify the differences between the parties, and crystallize the issues which would later resurface in the bargaining at the Cambridge location. The situation of the two branches was roughly similar, so that, from a practical point of view, it was unlikely that a concession made at one branch would be withheld at the other, or that the ultimate bargaining results would be much different. That proved to be the case.

8. From the union's perspective, the second round of bargaining at St. Catharines was not very successful. Despite the fact that this was the parties' second collective agreement, the employer was not prepared to make any significant concessions. To put the matter colloquially, it was not prepared to "let the tail wag the dog". It had more than 6,000 employees. The union represented only fifteen. The mere fact that a small number of its employees had opted for trade union representation, did not persuade the employer that it should offer them terms and conditions of employment markedly different from those of employees in similar positions in other branches. The first collective agreement had not involved any significant departure from the company's established policies, nor had there been any serious restriction on its previously unfettered right to manage the business as it saw fit. The company was determined to keep it that way.

9. As it turned out, the employees themselves were not prepared to press the matter to impasse. On February 22nd, the union put the employer's final offer to the St. Catharines employees with the recommendation that they reject it and authorize a strike. The employees declined to do so. They voted nine to six in favour of accepting the employer's offer. A collective agreement was subsequently signed on that basis.

10. With this background, it is hardly surprising that when similar issues were later raised at Cambridge, the employer was reluctant to depart from the St. Catharines position, unless it could be persuaded that the situation at Cambridge was different. From the employer's perspective, the St. Catharines agreement became the most relevant collective bargaining benchmark; moreover, its terms largely mirrored the wage and benefit programme applicable to the overwhelming majority (i.e., more than ninety-nine per cent) of the company's employees who

were not unionized. The *status quo*, its most recent bargaining experience, and its own business objectives, all suggested a collective agreement at Cambridge framed along the lines of the St. Catharines settlement. The union concedes that, in principle, it cannot quarrel with the reliance on a key settlement, or a desire for uniform treatment of employees in similar positions within the employer's organization.

11. As we have already noted, by the time the full-time unit at Cambridge was certified, the bargaining at St. Catharines was well underway and served to shape the bargaining posture of both parties. On January 11th, the union presented the company with its proposals for the Cambridge bargaining units. On January 17th, the parties had their first meeting. On January 19th, the trade union applied for conciliation, even though, at the time, there had been no discussion of the "part-time" issues at all. Cameron Nelson, the union's spokesman, explained that the key issues had already been canvassed at St. Catharines, and a repetition of the arguments would have been a "charade". He was anxious to complete the conciliation process so that the union would be in a position to threaten a lawful strike.

12. In fact, although there were substantial similarities, the issues raised at Cambridge were not precisely the same as those raised at St. Catharines. The union's opening position consisted of all of the St. Catharines demands, together with a number of new ones suggested by the employees at the Cambridge branch. Some of these proposals, as at St. Catharines, involved a substantial departure from the employer's established policies — such as the demand for twenty-six weeks of *paid* maternity leave in lieu of the existing seventeen weeks of *unpaid* leave. Other union demands were less costly or dramatic. The company's opening position involved a package with some modifications to the language of the first St. Catharines agreement.

13. If, as the union maintained, its position on the key issues had already been considered and rejected by the employer at St. Catharines, one might ask why the union presented identical and additional demands at Cambridge. The answer can be found in Mr. Nelson's explanation of why he applied for conciliation immediately after the first meeting with the employer dealing with the Cambridge issues. Nelson believed that the only possibility of extracting concessions from the employer lay in the threat of economic sanctions. Mere discussion, however detailed, civil and rational, would be insufficient where, as here, the parties had different frames of reference, premises, and objectives. Nelson wanted to be in a position to back his arguments not only with reason, but also with power — hence, the necessity of completing the conciliation process which, in Ontario, is a condition precedent to a lawful strike. In this respect, Mr. Nelson was acting upon and endorsing a fundamental tenet of our collective bargaining system — one to which we will address further comment below.

14. The employer was represented in bargaining by Robert Hiscox, its manager of employee relations and training. Mr. Hiscox had been an observer at the St. Catharines negotiations, but he had not taken a direct part in the bargaining. Cameron Nelson was the union's spokesman at both locations.

15. It is conceded that despite some scheduling difficulties because of the other commitments of the parties' spokesmen, there were a number of meetings and a vigorous discussion of the philosophical and substantive merits of the parties' respective positions. There was no refusal to recognize the union as the employees' bargaining agent, to meet at reasonable times, or to entertain the union's submissions on all of the matters in dispute. For its part, the employer explained the rationale for each of its positions, and why it was unwilling to accede to the union's

proposals. A number of items were "signed off" at the first meeting on January 17th, and further items were agreed upon at each and every meeting thereafter. In this sense, there was continuing "progress" towards a collective agreement. Information was forthcoming from the employer upon request (if not always immediately), and Mr. Nelson concedes that he was not hampered in bargaining by any inadequacy of information. Mr. Nelson testified that he did not think that the information he requested would really make much difference to the bargaining process and he was aware of much of it in any event.

16. There was an understanding that the parties would attempt to settle "language" before "money" issues, and that they would concentrate on the full-time agreement in the expectation that its terms would serve as a model for the part-time employees. By and large, they followed this procedure, and while the union now complains that the company refused to adequately discuss the part-time issues, we are satisfied that there was an understanding that the full-time agreement would be resolved first. In any event, there was later discussion on the part-time employee concerns, and we again note that the union applied for conciliation before there had been any discussion on the part-time issues at all. At St. Catharines there was no part-time unit. The parties had proposed, and the Board had certified, a single bargaining unit covering both full-time and part-time employees. To this extent, at least, the situation at Cambridge was a little different. But even here the St. Catharines experience was obviously relevant.

17. The union's concern was not a lack of discussion or even the employer's stance on any particular issue. In argument, the union conceded that the employer was prepared to sign a collective agreement (albeit on its own terms) and that it could have lawfully arrived at the bargaining position which prompted the union to call a strike. Mr. Nelson even testified that wages were never really a critical issue after the conclusion of the St. Catharines agreement. From the union's perspective, the problem was the absence of *any* significant concessions on *any* of the key issues. While conceding that the employer need not make a concession on any specific issue or adopt any particular position, the union submits that the employer was obliged to make *some* reasonable effort in *some* direction to compose its differences with the union, which, in the union's submission, necessarily involved at least *some* compromise or concessions. In the union's view, the employer's position amounted to no more than "fine tuning" the St. Catharines agreement. It was only prepared to agree to minor variations in relatively insignificant areas (for example, jury duty, or notice of technological change) where there were no established corporate norms, and the settlement would have no significant cost or precedent value. In substance, the only agreement which the employer was prepared to accept, was one which did not alter its established employment practices.

18. It is this determined effort to preserve the *status quo* and existing managerial prerogatives that the union contends is bargaining in bad faith because, it is argued, it effectively denies the union any meaningful participation in the regulation of the terms of the employer-employee relationship. It is admitted that the employer is prepared to recognize the union as the employees' bargaining agent, and to sign a collective agreement, but, in the union's submission, the employer is unwilling to concede to the union any significant role in representing employee interests or any substantial or significant right to challenge the unilateral exercise of managerial authority. A few references to the employer's bargaining positions may serve to illustrate the nature of the union's complaints.

19. In the case of wages, the employer explained that the salary levels for its branches were based upon a modified "Hay system" of job evaluation, which generated a salary grid

through which employees would progress depending upon their performance. The same system was applicable in all of the employer's branches and, in particular, in the twenty-eight branches in its mid-western Ontario region. Benefits, likewise, were established on a group basis for the company's entire employee population. In both cases, the company sought to preserve uniformity and ease of administration. Collective bargaining had imposed a legal regime on two of its branches which was quite different from that of the other two hundred, and the company was prepared to recognize that fact. But the company was not prepared to agree to different substantive terms and conditions of employment for this tiny minority, nor did it welcome the prospect of arbitral review of its decisions as to when, on the basis of merit, an employee should receive a promotion or progress to a higher level in the established salary range. In the former case, the employer was simply unwilling, merely because the union demanded it, to accede to a higher level of remuneration for the employees at Cambridge than was payable to employees doing the same work elsewhere — including St. Catharines where the terms and conditions of employment had already been established by collective bargaining and were embodied in a collective agreement. In the latter case, the employer was unwilling to share its managerial prerogatives with an arbitrator or fetter its right to make its own assessment of employee ability.

20. A similar theme underlies the employer's position on seniority. Once again, it was prepared, *in its discretion*, to consider an employee's length of service in promotion or layoff situations, but it was firm about preserving what was described as the "merit principle" upon which the employer had purportedly operated for years, and which was said to be an important element in its business success. Once more, it did not want an arbitrator "second-guessing" those decisions, nor did it welcome the prospect of costly arbitration proceedings, even if the ultimate result was a finding in the company's favour.

21. In the case of employee terminations, the company was prepared to agree to a "just cause clause" but demanded the inclusion of a list of offences for which the specific penalty of discharge would be in order. The effect would be to limit an arbitrator's discretion to substitute some lesser penalty; and while most of the listed offences (theft, sabotage, misappropriation of funds, unauthorized disclosure of financial information to competitors, etc.) would in most cases result in a discharge which would probably be sustained by most arbitrators, there were other offences (being under the influence of alcohol while at work, conviction of a criminal offence, refusal to accept scheduled hours, etc.) where the result might be more problematic. Section 44(9) of the *Labour Relations Act* contemplates that the bargaining parties may limit an arbitrator's discretionary remedial authority by including in their collective agreement "specific penalties" for designated offences. That is what the employer sought to do.

22. The employer also sought some variation in the description of the bargaining unit, to recognize the fact that, on an overall corporate basis, the distinction between "part-time" and "full-time" status for wage and benefit purposes was drawn at twenty-five hours per week, rather than twenty-four hours as determined by the established practice of the Ontario Labour Relations Board. Similarly, there were established corporate policies respecting employees who might have occasion to work in a particular branch for less than twelve hours per week. The company regularly transferred employees from one branch to another to work for a few hours when there were unexpected scheduling problems at the branch, thereby creating quite a number of transient employees who would regularly spend short periods of time away from their home branch. This was of no consequence when moving from one non-union branch to another, but might pose problems (job posting, overtime entitlement, etc.) if these employees were temporarily transferred to a branch covered by a collective agreement. The company sought to exclude these casual employees from the bargaining unit in order to avoid such

administrative problems, and at St. Catharines the union was prepared to accept this proposition. At Cambridge, the union resisted and the matter was eventually dropped.

23. We do not think it is necessary to multiply the examples. Mr. Hiscox was quite candid in his admission that the company preferred to operate in a union-free environment, and, for the most part, continued to do so. The two branches represented by the union were a tiny island of collective bargaining in a sea of unorganized workers for whom there were well-established employment policies based (in the company's view) on objective criteria. The company was unwilling to depart from those policies simply because the union demanded something different. And, for the same "political reasons" that prompted the union to seek a collective bargaining breakthrough, the company was determined to resist. Any significant concessions would give the union a public relations victory, would provide the "ammunition" for future organizing campaigns, and, one way or another, would have to be extended to all the other branches. From the company's perspective, it might be difficult to maintain wage differentials between groups performing essentially similar functions. The employer was prepared to sign a collective agreement on terms similar to those established in the St. Catharines agreement. It was not prepared to go much further.

24. Faced with what he regarded as the employer's intransigence, Mr. Nelson decided early in the bargaining process that it would be necessary to seek a mandate for strike action. As we have already noted, the union applied for conciliation immediately after the first meeting to deal with the Cambridge situation, and by February 13, 1984, it had obtained "no-board reports" for both the full-time and part-time bargaining units. Seventeen days thereafter, it would be in a legal position to call a strike. On February 23rd, it scheduled a meeting of employees to seek their authorization.

25. The meeting was conducted in two stages: first with only the trade union members present, then with those who were not trade union supporters. In both cases, Mr. Nelson explained the parties' bargaining positions and the reasons why there was unlikely to be any movement unless the union was authorized to call a strike. Although there were two separate bargaining units, the union decided that there should be but one combined ballot for both units. The result was ten ballots in favour of strike action, and eight against.

26. Mr. Nelson regarded the results as sufficiently different from St. Catharines (where a similar strike call had been rejected the night before) to constitute a firm mandate to call a strike if the bargaining committee considered it necessary. They did; and a strike commenced on March 22nd. Six of the eight full-time employees refused to participate, as did six of the twelve part-time employees. These dissenters remained at work. The rest of the employees manned the picket line. The company endeavoured to carry on business as usual. The present complaint was filed on April 11, 1984, and by the time the hearings were completed, it was unclear whether any of the employees still remained on strike.

27. The union contends that the employer has engaged in a series of empty discussions, since, except in inconsequential areas, it has adhered rigidly to its own views of the appropriate content of a collective agreement, and has been unwilling to seriously consider or conclude an agreement embodying any of the union's proposals. It will willingly accede to an agreement based on its existing policies and practices. It is unwilling to conclude an agreement on any other basis. In the union's submission, the agreement proposed by the employer would provide little opportunity to effectively represent employees on matters of concern to them, and virtually no independent review of the exercise of managerial discretion. It is, in the union's view, form

without substance. It does little more than affirm the *status quo*, incorporating existing employer policies and unilateral management authority into the terms of the agreement. The union argues that this is the antithesis of “real” collective bargaining which, it submits, should accord the union the right to participate in or challenge decision-making which adversely impacts upon employees. The union characterizes the employer’s position as a form of “Boulwarism”, and relies upon the decision of the National Labour Relations Board in *General Electric Co.*, 150 N.L.R.B. 192, 57 L.R.R.M. 1491 (1964); affirmed 418F (2d) 736, 72 L.R.R.M. 2530 (C.A.2, 1969); *certiorari* denied 397 U.S. 965, 73 L.R.R.M. 2600 (1970). The union submits that the employer’s rigid adherence to its established practices, and determination not to yield except on minor items, is a negation of the collective bargaining process mandated by the statute.

28. We do not agree, nor do we think it is necessary in this case to undertake any extensive analysis of the American jurisprudence flowing from the controversial 1964 decision in *General Electric*. American decisions arising in a different legislative, historical and jurisprudential context, do not necessarily provide an unfailing guide to the legal result in this jurisdiction; and, in any event, when this case is compared to *General Electric*, it is apparent that the circumstances are not similar. The N.L.R.B.’s finding in *General Electric* was based upon the totality of the employer’s conduct, including: a failure to furnish relevant information requested by the union; an attempt to bargain with local unions directly so as to undermine the position of the International; the presentation of a variety of proposals, without much discussion, on a take it or leave it basis; taking untenable and unreasonable positions, without tangible business justification, for no apparent purpose other than to avoid yielding to the union; and a massive communications programme undertaken as if the union did not exist and designed to convince employees that the employer was responsive to its needs while the union was not — a communications campaign which, in the N.L.R.B.’s view, amounted to direct dealings with the employees in derogation of the union’s status as the employees’ exclusive bargaining agent. The circumstances here are clearly distinguishable. [For a good overview of the American law in this area, see Charles J. Morris, *The Developing Labour Law*, pp. 553-682. For an examination of the results of the American decision to regulate the *subject matter* of collective bargaining, see pp. 694-872.]

29. We do not question the occasional value of references to the American jurisprudence. The American regulatory experience can provide useful analogies and insights, as well as vivid illustrations of the logical consequences to which seemingly narrow principles can be taken as the law unfolds on a case by case basis. These consequences may only be dimly perceived in the early stages of this legal development, and, in this sense, the American case law may not only provide support for novel propositions not previously endorsed in this jurisdiction, but also concrete evidence of the reasons why such propositions should not be accepted. Once the genie is out of the bottle, or Pandora’s box is opened, it may be difficult to return to the previous *status quo*, and when faced with a hard case, it is useful to know whether the result which seems to commend itself to the tribunal is likely, in the end, to make “bad law” or, at least, bad policy. However, in our view, the principles necessary for the resolution of this particular case, can be found closer to home. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220 the Board had this to say:

The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the

details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See *York Regional Board of Health* (1978), 18 L.A.C. (2d) 255 at page 263 (Adams).



67. Thus, from an employee viewpoint the right to engage in collective bargaining is not a right to achieve the terms of employment employees may wish. It is simply an opportunity to combine together to try and achieve their needs with the possibility that economic realities will dictate quite a different result in any particular situation.

Similarly, in *C.C.H. Canadian Limited*, [1974] OLRB Rep. 375, the Board observed:

There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith. (See *Regina ex. rel. Hearn v. Norfolk General Hospital* [1957] 119 C.C.C. 290 (Ont. Mag. Ct.). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application.

Finally, in *DeVilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678, the Board described the purpose of the bargaining duty as follows:

It is our belief that the duty. . . has at least two functions. The duty reinforces the obligation of the employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.

30. We have juxtaposed these various passages, because, in our view, it is important to reiterate both the substance of the bargaining duty, as well as its limitations. In recent years the Board has been scrupulous to protect the framework of collective bargaining: the independence of the union, the integrity of its role as the employees' exclusive bargaining agent, and

the right to information necessary for it to properly perform its statutory role. But the Board has been equally clear that it will not act as interest arbitrator, or prescribe the precise contents of the parties' collective agreement — even in the face of an “egregious” breach of the duty to bargain in good faith (see *Radio Shack, supra*). The content of the agreement is for the parties to determine, in accordance with their own perceived needs and relative bargaining strengths. The legislation enables employees to combine together to bargain collectively and compels the employer to recognize their bargaining agent. It further provides a framework within which there can be an exploration of the parties' differences and a sincere effort to reach some accommodation. Despite the adversarial aspects of collective bargaining, there are substantial areas of mutual interest between employers and employees which informed discussion may reveal. But the statute does not *require* any particular concessions, nor does it stipulate the content of a collective agreement, or even that a collective agreement always must be the necessary outcome of the parties' bargaining.

31. One cannot quarrel with the proposition that the “duty to bargain in good faith” must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision-making as the normative standard for the collective bargaining process. Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development from given and accepted premises. It is a process in which reason plays a part — but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a “claim of right” from a “naked demand”. Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a “fair” settlement, or a just allocation of rewards to capital and labour.

32. Rational discussion is an important aspect of the bargaining process. So is power. Persuasion is an effective tactic to gain one's bargaining objectives. So is economic pressure. Whether that system actually results in a “just wage” or “distributive justice”, we leave for others to debate. Collective bargaining permits that outcome, but it does not compel it. (For an interesting analysis of the impact of collective bargaining see: *What Unions Do* by R. B. Freeman & J. L. Medoff, Basic Books, New York, 1984.)

33. The facts of this case provide a graphic illustration of the absence of shared principle, and the predominance of bargaining power as a means of settling the parties' collective bargaining differences. The union seeks to limit the exercise of managerial authority and achieve for its supporters, terms and conditions of employment not only more generous than the employer is willing to pay, but also more generous than the employer is currently paying to hundreds of other employees in identical circumstances. The employer seeks to maintain its managerial prerogatives and provide levels of remuneration consistent with its own assessment of its needs, its own organizational imperatives, and its own perception of the dictates

of the market place. There is no obvious way of reconciling these competing interests, nor is there any reservoir of principle to which one can resort to provide the "right answer". No amount of rational discussion or reasoned elaboration will necessarily produce an accommodation. Nor can there always be such accommodation in our system of free collective bargaining which ultimately rests, as it must, on the right of parties to resort to economic sanctions in pursuit of their own self-interest as they define it. Under our statute their only obligation is to endeavour to conclude a collective agreement and if that is the true intent, neither the content nor the consequences of that agreement are of any concern to the Board.

34. This is not to say that collective bargaining must always be a "zero sum game", or that there cannot be substantial areas of mutual accommodation and joint decision-making. But our statute mandates collective bargaining, not co-determination. Co-determination, or co-partnership may be the *result* of collective bargaining, but it is not an outcome required by law. Nor was the duty to bargain in good faith designed to redress an imbalance of bargaining power. A party whose bargaining strength allows it to virtually dictate the terms of the agreement does not thereby bargain in bad faith, and that proposition is applicable whether it is the union or the employer which "has the upper hand".

35. In the circumstances of this case, we are satisfied that the employer's conduct is properly characterized as hard bargaining in pursuit of its own self-interest and legitimate business objectives. It was, and remains, prepared to sign a collective agreement on terms similar to those agreed to in St. Catharines, and, in our view, it was entitled to take into account the relative insignificance of this bargaining unit in its overall organizational scheme. If its rigid insistence on the preservation of management rights has a certain ideological cast, it is one which in our system is recognized as legitimate. There has been no breach of section 15 of the Act. The complaint is therefore dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

I have read the majority decision. I do not agree. In my view, from the very outset, the employer took a position which it knew was tailored for rejection. There was no real intention to conclude a collective agreement. The employer was merely going through the motions.

0243-84-U Canadian Pneumatic Control Contractors Association, Complainant, v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Mechanical Contractors Association of Ontario, Respondents

Construction Industry — Duty to Bargain in Good Faith — Remedies — Unfair Labour Practice — Prior Board decision ruling pneumatic control employers, in ICI sector within plumbers' provincial agreement — Finding separate national agreement for pneumatic control contrary to s.146(2) — EBA refusing to bargain provincially over pneumatic control and insisting on national agreement — Reneging on agreement to cover employers through appendices — Bad faith bargaining and breach of s.146(2) — Board not forcing inclusion of appendices as remedy

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *Brian P. Smeenk, C. A. Hepburn and Wm. Scrafton for the complainant; G. Grossman, W. J. McCarron and H. J. Buchmueller for the Mechanical Contractors Association of Ontario, no one for the other respondents.*

DECISION OF THE BOARD; October 12, 1984

1. The complainant has complained that it has been dealt with by the respondents contrary to the provisions of sections 15, 146 and 151 of the *Labour Relations Act*.
2. The complainant is an association of three contractors, Johnson Controls Ltd., M.C.C. Powers, a unit of Mark Controls Corporation and Robertshaw Controls Canada Inc., engaged in the manufacture, maintenance and installation of pneumatic controls. The three contractors operate environmental equipment such as air conditioning and process and manufacturing equipment.
3. The members of the complainant have recently negotiated with one another in the United States and Canada and since 1974 have had a National Canadian Pneumatic Controls Agreement (the "National Agreement"). The National Agreement picks up local terms and conditions applicable across the country but contains provisions which are important to the industry, for example, crew size, mobility provisions and special provisions regarding the supply of men and travel allowance.
4. During the strike in 1982 in the industrial, commercial and institutional sector of the construction industry in Ontario, the members of the complainant as well as Honeywell Controls Ltd. at first continued to work on the basis that they believed they were not bound by the provincial collective agreement. In *Honeywell Controls Ltd. et al.* [1983] OLRB Rep. May 641 the Mechanical Contractors Association of Ontario ("MCAO") filed a complaint with the Board pursuant to section 89 of the *Labour Relations Act* alleging a violation of section 146(2) of that Act. Section 146(2) states:

On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated

bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

5. The effect of section 146(2) renders any collective agreement or other arrangement other than a provincial agreement null and void in the industrial, commercial and institutional sector of the construction industry where designations are in effect pursuant to section 139 of the Act. The MCAO is a designated employer bargaining agency and the designation which was issued on April 3, 1978, provides:

The designation of The Mechanical Trade Bargaining Committee of the Mechanical Contractors Association of Ontario dated March 21, 1978 is hereby revoked and the following designation is substituted therefore:

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, I hereby designate the Mechanical Contractors Association of Ontario as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; or
2. the following Local Unions: 46, 67, 71, 221, 320, 463, 508, 527, 552, 593, 599, 628, 663, 666, 800, and 819; or
3. any other Local of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada which in the future may be chartered to represent Journeymen and Apprentice Plumbers and Pipefitters,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have

been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

This designation is subject to the condition that the Mechanical Contractors Association of Ontario file with my office a copy of the appropriate changes in its constitution to accommodate The Industrial Contractors Association's representation on the Mechanical Contractors Association of Ontario.

April 3, 1978 "Bette Stephenson"
Bette Stephenson
Minister

6. The Ontario Pipe Trades Council (the "Council") of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the "International") are together designated an employee bargaining agency and the designation which was issued on April 12, 1978, provides:

The designation of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada dated March 21, 1978, is amended by substituting the word "employees" for the word "employers" in the thirty-third line thereof; so that the designation reads as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, I hereby designate the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice Plumbers and Pipefitters, represented by the following affiliated bargaining agents:

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; or
2. the following Local Unions: 46, 67, 71, 221, 320, 463, 508, 527, 552, 593, 599, 628, 663, 666, 800, and 819; or
3. any other Local of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada which in the future may be chartered

to represent Journeymen and Apprentice Plumbers and Pipefitters,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

April 12, 1978 "Bette Stephenson"
Bette Stephenson
Minister

7. In paragraph 11 of *Honeywell Controls Ltd. et al.*, *supra*, the Board stated:

11. On the evidence before us, we are satisfied that the respondent companies perform pneumatic control installation work within the industrial, commercial and institutional sector of the construction industry. A long history of negotiating national agreements does not and cannot alter this fact. We are further satisfied the work in question is a specialization of the plumbing and pipe fitting trade and the contractors either individually or through their association have collective bargaining relationships with the International Association which is subject to and constrained by the applicant's [sic] designation as employer bargaining agent. Accordingly, we are satisfied that the respondent companies are equally subject to the applicant's [sic] designation as bargaining agent and that the designation is not defective in any way. It is not for this Board to review the procedure by which the designations were originally made. Some of the respondent companies argued the need for another sector but no such case was made out. Electrical control work has been accommodated by the electrical provincial agreement. There are also many examples under other provincial agreements of parties according distinctive treatment to particular lines of work by appendices. We also point out that any employer bargaining agency owes a duty of fair representation to its constituent employers and the applicant [sic] will have to be sensitive to possible conflicts of interest referred to by some of the witnesses in this case. However, pursuant to the Board's remedial authority granted by section 89 the declaration contained above in this paragraph and a related declaration that any pneumatic control agreement insofar as it pertains to the industrial, commercial and institutional sector is null and void shall not be effective until the expiration of the current

provincial agreement unless the applicant [sic] is willing to adopt the salient terms of the pneumatic control agreement as an appendix to the provincial agreement for the duration of the current provincial agreement. This condition is based on the considerable history of pneumatic control bargaining and the way in which the matter arose. In our view the parties should be given a meaningful opportunity to deal with the various issues involved in integrating pneumatic control work into the provincial agreement. We further provide that these conditions are in turn conditioned upon the respondent companies continuing to pay into the industry fund set out in the provincial agreement.

8. The Board clearly suggested that a distinctive treatment in an appendix might appropriately accommodate the special concerns of Honeywell Controls Ltd. and Johnson Controls Ltd. The same suggestion, of course, would apply to all of the members of the complainant. The current provincial agreement referred to in *Honeywell Controls Ltd. et al.*, *supra*, expired on April 30, 1984. The Board in its decision was affording the parties a chance to integrate the salient terms of the pneumatic control agreement into the provincial agreement.

9. As a result of the decision in *Honeywell Controls Ltd. et al.*, *supra*, the complainant through its counsel formally requested a meeting with the MCAO to discuss how the interests of MCAO could be accommodated. A meeting was arranged for October 26, 1983. The minutes of this meeting indicate that the complainant made the request to the MCAO that the following be appended to the provincial agreement:

10. We asked that the following articles of our agreement be appended to the M.C.A.O. agreement:

1. Article VII, Crew Size.
2. Article VIII, Supplying Men.
3. Article X, Use of Personal Cars.
4. Article XI, Pay Day.
5. Article XIV, Fabrication.

10. In a letter dated February 1, 1984, from the complainant to the MCAO, the complainant stated that it would like to append the following relevant articles from its national agreement to the MCAO provincial agreement which was currently being negotiated. These articles state:

1. Article VII, Crew Size

21. The need for, the designation of, and the determination of the number of journeymen, foremen, or general foremen is solely the responsibility of the Employer. If a condition in a Local Agreement conflicts with this paragraph, the provisions of this Agreement shall prevail.

2. Article VIII Supplying Men

22. The Union agrees to furnish at all times to the Employer duly qualified journeymen and apprentices in a sufficient number, as determined by the Employer, as may be necessary to properly execute all work contracted by the Employer.
23. The Employer shall notify the local union to refer competent and skilled journeymen and apprentices as required.
24. In the event the local union is unable to supply the requested number of qualified and competent journeymen, the Employer may request the United Association to furnish such additional employees as it requires, and the United Association agrees to notify its local unions of the availability of work and request the local unions to refer journeymen to the Employer.
25. If, upon written request, the local union or the United Association is unable, within forty-eight (48) hours, Saturdays, Sundays, and Holidays excepted, to supply workmen, including workmen with special skills and requirements, the Employer may secure workmen from any source.
26. If a requirement for journeymen, competent and skilled in the work covered by this Agreement exists, and such journeymen cannot be obtained under this Article, the Employer shall be permitted to hire and train men, subject to the provisions of Article IV. It is understood that preference for such employment and training shall be given to journeymen with previous experience in the plumbing and pipe fitting industry.
27. The Employer agrees to be bound by the hiring provisions of the agreement of the local union having jurisdiction that are not inconsistent with the terms of this Agreement.
28. The Employer shall retain the right to reject any applicant referred by the Union.
29. The Employer may, at his discretion, assign one journeyman or one foreman from the area in which the Employer is located to work each job or jobs, within the territorial jurisdiction of another local union. Where this is done they shall be permitted to work without the Employer being required to hire any other employee.
30. When an employee is assigned as set forth above in paragraph 29, he shall work under the following rules:
 1. When wages, overtime, and working conditions differ from those of this home local, the better shall apply.

2. All of the legally negotiated fringe benefit contributions, or deductions under his home local union's agreement, shall be paid only to the Trustees of the Fringe Benefit Funds of his home local union.
3. He shall be paid for travel in accordance with Article X.
4. He shall be permitted to work without being required to take out a travel card, working permit, or pay assessment of any kind, unless he is scheduled to work in the territory for a period of at least thirty (30) consecutive work days.
31. Men referred to jobs shall report to a location designated by the Employer. When requested to stay away from home overnight the men shall be reimbursed for meals and lodging at reasonable rates which, when not previously established, will be substantiated by receipts.
32. 1. Journeymen with specialized skills shall perform any work assigned by the Employer which comes within the coverage of this Agreement, and there shall be no limit on production by workmen nor restriction on the full use of tools and equipment.
2. There shall be no standby crew nor feather-bedding practice.
33. Selection and employment of apprentices and the administration of the local apprenticeship system shall be governed by the terms and procedure provided in the local agreement of the local union having jurisdiction.
34. The selection of applicants for referral to jobs shall be on a non-discriminatory basis.
3. Article X, Use of Personal Cars
 36. Employees covered by this Agreement are permitted to use their personal automobiles for transportation from one job to another during the work day and for transporting company tools and material. There will be no discrimination against those who do not wish to use their personal automobiles. The Employer, at his discretion, may supply a vehicle for such purposes.
 37. Where an employee is authorized to use his personal automobile as covered in Paragraph 36, he is to be reimbursed for costs of business mileage, which will include operation, maintenance, insurance, etc.
 38. In order to satisfy the provisions of Article X, Clause 36, and 37,

of the current Canadian National Pneumatic Controls Systems Agreement, the following agreements have been reached:

1. Effective April 1, 1980, a mileage rate of 38 per mile will be paid, which includes the allowance for transporting company tools and material, etc.
2. It is agreed that on January 1st, 1981, the mileage rate shall be increased by one cent per mile for each 11 per imperial gallon increase in the price of gasoline during the period from January 1st, 1981 to December 31st, 1981. The increase shall be based on the per gallon price increases as announced by the Federal Government with any portion to be carried over to the next period.
3. In the event that the locally agreed mileage rate as established for all employees in local agreements, negotiated by the local union of the United Association and the historically recognized local Contractor's bargaining group, is higher than the mileage rates set out above, the higher rate shall apply.

4. Article XI, Pay Day

39. Pay day shall be once each week, on the fifth working day following the end of the Employer's payroll period, except for extenuating circumstances beyond the control of the Employer. Employees are to be paid, at the option of the Employer, in cash or negotiable payroll check, in person or by mail. When employees are laid off, or discharged, they shall be immediately paid all wages due.
40. The Employer will not be required to comply with local union surety bonding requirements during the term of this Agreement.

5. Article XIV, Fabrication

44. In order to secure work for employees working at the job site under this Agreement, and in order to protect wages and working conditions of such employees, the Employer shall:
 1. Fabricate all pipe on the job site or in the Employer's local shop.
 2. Do work, coming under this Agreement, on all control centres, panel boards, gauge boards, and cabinets on the job site, in the Employer's local shop, or in the Employer's central fabrication shop, wherever it may be located.

A subsequent letter dated February 29, 1984, from the complainant to the MCAO stated:

To confirm our telephone conversation:

We would like Article X, Use of Personal Cars, Paragraph 38, of our proposed appendix to read as follows:

38. In order to satisfy the provisions of Article X, Clause 36 and 37, of this appendix, the following agreements have been reached:

1. Effective May 1, 1984, a rate of 27 per kilometer will be paid, which includes the allowance for transporting company tools and material, etc.
2. It is agreed that on May 1, 1985, the rate shall be increased by one cent per kilometer for each 4 per litre increase in the price of gasoline during the period from May 1, 1984 to April 30, 1985. The increase shall be based on the per litre price increases as announced by the Federal Government with any portion to be carried over to the next period.
3. In the event that the locally agreed rate as established for all employees in local agreements, negotiated by the local unions of the United Association and the historically recognized local contractor's bargaining group, is higher than the rates set out above, the higher rate shall apply.

11. As a result of these requests, the MCAO did in fact include the proposals of the complainant in the proposals which it gave to the Employee Bargaining Agency during negotiations on February 29, 1984. The MCAO also granted the complainant observer status on its mechanical trades bargaining committee. Negotiations between the MCAO and the employee bargaining agency were carried on throughout April of 1984. During meetings on April 23, representatives of MCAO had reached an agreement with representatives of the employee bargaining agency with respect to the pneumatic control issue. The agreement was that a joint committee would be struck consisting of representatives of the International, the Council and the MCAO. A second aspect of the agreement was that until such times as the actual terms of the appendix could be finalized the *status quo* situation vis-a-vis the pneumatic control work being work in the industrial, commercial and institutional sector would remain intact, that is to say, working under the terms of the National Agreement as ordered by the decision of the Board in *Honeywell Controls Ltd. et al., supra*. The joint committee was to be structured after the principal negotiations had been settled.

12. During the late afternoon of April 24, Russell St. Eloi became active. He had a conversation with representatives of the Mechanical Trades Bargaining Committee and he stated that he was not going to negotiate any pneumatic control terms with the MCAO. Mr. St. Eloi stated that he was the Canadian Director of the International and that only he had the authority to negotiate pneumatic control agreements. He stated that he had negotiated and would continue to negotiate on a national basis. He further stated that there would never be a provincial agreement with a pneumatic control agreement in it. After Mr. St. Eloi had made these statements the Employee Bargaining Agency reneged on its earlier commitment to set up the joint committee and allow the *status quo ante* to remain.

13. As a result of the sequence of events referred to in the preceding paragraph and with the deadline for a strike quickly approaching, the MCAO was forced to withdraw the proposed

appendix from its proposals. After the presentation of the facts to the Board the complainant withdrew its complaint against the MCAO. It was the position of the complainant that the conduct referred to earlier constituted bargaining in bad faith against the Council and the International on three grounds. Firstly, the refusal to negotiate any terms for pneumatic control was a violation of section 15. Secondly, in renegeing on the earlier agreement to establish a joint committee and allow the *status quo* situation to remain was a violation of section 15. Thirdly, in negotiating in a manner which is inconsistent with the province-wide bargaining sections of the *Labour Relations Act*.

14. The complainant sought declarations that the Council and the International had violated section 15. The complainant also sought a declaration that the Council and the International had breached section 146 in seeking to maintain a national agreement in conflict with the provincial agreement notwithstanding the decision of the Board in 1983 in *Honeywell Controls Ltd. et al.*, *supra*. The complainant also sought an order that the representatives of the Council and the International cease and desist from those acts. The complainant also urged that, in view of the MCAO's agreement, it was appropriate to include the pneumatic controls appendix in the provincial collective agreement and it was entitled to an order that the letters dated February 1 and 29, 1984, be included in an appendix to the provincial collective agreement.

15. The MCAO informed the Board that a memorandum of agreement had been signed and that the Employee Bargaining Agency had notified the MCAO in writing that the memorandum had been ratified. At the time of the hearing the Employer Bargaining Agency was about to ratify the memorandum of agreement.

16. In *Honeywell Controls Ltd. et al.*, *supra*, the Board resolved the issue of the place of the complainant and its members in the scheme of provincial bargaining in the industrial, commercial and institutional sector of the construction industry with respect to journeymen and apprentice plumbers and pipefitters. In that decision the Board directed that certain steps be taken with a view to integrating the employers which perform pneumatic control installation work in the industrial, commercial and institutional sector of the construction industry. It appears that the MCAO has taken all reasonable steps to accomplish this integration by accommodating the complainant and its members and has entered into the spirit of that earlier decision until it was confronted with the conduct of Mr. St. Eloi.

17. The impact of the national collective agreements on collective bargaining in Ontario has recently been considered in *Burns Meats Ltd.* [1984] OLRB Rep. Aug. 1049. In that case the Board concluded that a trade union violated section 15 where it had pursued to an impasse a demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which had been traditionally covered by a national collective agreement. In the instant case, of course, the freedom of Mr. St. Eloi to have absolute control over the content, form and extent of collective agreements is circumscribed by the provisions of the *Labour Relations Act*. Section 146(2) makes it clear on the facts of this complaint that there may not be a collective agreement other than a provincial collective agreement. The Employee Bargaining Agency was apparently prepared to negotiate with the MCAO for the accommodation of the employers which perform pneumatic control installation work in the industrial, commercial and institutional sector of the construction industry until the arrival of Mr. St. Eloi.

18. The Employee Bargaining Agency has an obligation to meet with the MCAO and bargain in good faith and make every reasonable effort to make a collective agreement. The Employee Bargaining Agency does not satisfy that obligation when it refuses to continue to bargain on the terms and conditions of certain employers and employees who are required by law to be included in the same provincial collective agreement with other employers and employees. While the terms of any national collective agreement may mirror the appropriate terms of the provincial collective agreement, the Employee Bargaining Agency may not refuse to bargain in good faith and make every reasonable effort to reach a collective agreement within the framework of provincial bargaining in Ontario. On the material before the Board there is no indication that the Employee Bargaining Agency seriously considered the proposals for a separate appendix with respect to the employers (and their employees) which perform pneumatic control installation work in the industrial, commercial and institutional sector of the construction industry. The indication of the Board in *Honeywell Controls Ltd. et al.*, *supra*, that the salient terms of the pneumatic control collective agreement be adopted as an appendix to the provincial collective agreement, reflects other satisfactory arrangements which has been worked out under the umbrella of a provincial collective agreement. For example, the provincial collective agreement which covers carpenters and carpenters' apprentices also contains separate appendices respecting caulking, resilient flooring and acoustic and drywall.

19. The Employee Bargaining Agency at the instigation of Mr. St. Eloi has refused to bargain in good faith over the terms and conditions with respect to employers (and their employees) which perform pneumatic control installation work in the industrial, commercial and institutional sector of the construction industry. Those employers and employees as a result of the decision of the Board in *Honeywell Controls Ltd. et al.*, *supra*, and the provisions of section 146(2) are required to be included in the same province-wide collective agreement as other employers and their employees who are journeymen and apprentice plumbers and pipefitters in the industrial, commercial and institutional sector of the construction industry. It is hard to conceive of a clearer violation of the obligation under section 15 than in the instant complaint where an Employee Bargaining Agency is refusing to bargain for employees who are part of the bargaining unit in the province-wide collective agreement. Such a refusal may give rise to issues under section 68 as to whether such employees have been fairly represented. In *Burns Meats Ltd.*, *supra*, a trade union refused to bargain for any employees other than on a national basis and in the instant complaint the Employee Bargaining Agency is not prepared to bargain on behalf of certain employees in the hope of including them in a national collective agreement. The Employee Bargaining Agency is entitled to have its preferences and goals. However, the Employee Bargaining Agency in pursuing its preferences and goals is not entitled to violate sections 15 and 146(2). The complainant now has the co-operation and the good faith of the MCAO. The effect of the decision in *Honeywell Controls Ltd. et al.* has apparently not been accepted by Mr. St. Eloi. The Board has considered the request of the complainant that the letters dated February 1 and 29, 1984, be included in an appendix to the provincial collective agreement. The complainant was unable to refer to any authorities where this had been permitted. In our view, the parties to the province-wide collective agreement ought to be permitted to consider these letters and their possible integration into the province-wide collective agreement as an appendix. These letters certainly appear to be a fair basis for commencing bargaining on an appendix to the province-wide collective agreement. However, where the parties to a collective agreement have apparently never discussed and assessed the inclusion of the proposals contained in these two letters in a collective agreement, it is our view that the parties ought to bargain over these proposals. It would be inappropriate in the circumstances of this complaint for the Board to compel the inclusion of these proposals in an appendix to the province-wide collective agreement.

20. Having regard to the foregoing and pursuant to the remedial provisions of section 89(4) of the *Labour Relations Act*, the Board determines and directs that:

- I The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency by refusing to continue to bargain respecting the proposals of the Mechanical Contractors Association of Ontario as the Employer Bargaining Agency for an appendix to the current provincial collective agreement (covering journeymen and apprentice plumbers and pipefitters) respecting employers (and their employees) which perform pneumatic control installation work in the industrial, commercial and institutional sector of the construction industry have contravened section 15 of the *Labour Relations Act*;
- II The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency shall forthwith cease and desist from their contravention of section 15 of the *Labour Relations Act*;
- III The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency by insisting upon negotiating a separate pneumatic control collective agreement on a national basis have attempted to bargain for employees represented by affiliated bargaining agents for other than a provincial collective agreement have contravened section 146(2) of the *Labour Relations Act*;
- IV The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency shall forthwith cease and desist from their contravention of section 146(2) of the *Labour Relations Act*.
- V The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency shall forthwith return to the bargaining table and bargain in good faith with the

Mechanical Contractors Association of Ontario as the Employer Bargaining Agency over the inclusion of the proposals contained in the letters dated February 1 and 29, 1984 (referred to in paragraphs 10 and 11 in this decision), in an appendix as an amendment to their current collective agreement.

0951-84-R Jocelyn Young & Lynda Gattwald, Applicants, v. United Food & Commercial Workers Local 1000A, Respondent, v. **Cara Operations Limited** (Retail Stores Division), Intervener

Petition — Practice and Procedure — Termination — Whether applicant perceived as managerial — Whether preamble seeking “decertification of said contract” adequate — Union representing full and part-time units — Two similar but separate collective agreements — Both applicants members of full-time unit — Petitions signed by both groups — Whether applicants having standing to apply with respect to part-time unit

BEFORE: R. A. Furness, Vice-Chairman, and Board Members F. C. Burnet and P. Grasso.

APPEARANCES: *M. G. Horan and Jocelyn Young for the applicants; Bernie Hanson, Bill Cox and Valerie Hoff for the respondent; Michele McCarthy and Wanda Paszkowski for the intervener.*

DECISION OF THE BOARD; October 2, 1984

1. The applicants have applied to the Board under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining units for which it is the bargaining agent.

2. The respondent and the intervener were parties to two collective agreements — one for full-time employees and one for part-time employees. These collective agreements became effective on July 1, 1982, and expired on June 30, 1984, with provision for renewal subject to notice. This application was filed on June 28, 1984. Having regard to the provisions of section 57(2) this is a timely application to terminate the bargaining rights of the respondent.

3. The full-time bargaining unit is defined as:

All employees of Cara Operations Limited (Retail Stores Division) in its gift stores and drug stores at Terminal 1 and Terminal 2, Toronto International Airport, Malton, Ontario, save and except assistant managers, supervisors, and those above the rank of assistant manager or supervisor, pharmacists, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (bargaining unit #1)

4. The part-time bargaining unit is defined as:

All employees of Cara Operations Limited (Retail Stores Division) regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in its gift stores and drug stores at Terminal 1 and Terminal 2, Toronto International Airport, Malton, Ontario, save and except assistant managers, supervisors, persons above the rank of assistant manager or supervisor; pharmacists and office and clerical staff. (bargaining unit #2)

5. Three statements of desire were filed in support of this application to terminate the bargaining rights of the respondent. A statement of desire was also filed in opposition to this application. However, the signatures on the statement of desire which was filed in opposition to this application did not materially affect the level of support which the applicants had apparently received on the three statements of desire which had been filed in support of this application. In these circumstances, the Board inquired into the origination, preparation and circulation of the three statements of desire which were filed in support of this application and did not inquire into the origination, preparation and circulation of the statement of desire which was filed in opposition to this application.

6. Jocelyn Young and Lynda Gattwald are members of the full-time bargaining unit. Towards the end of June and the beginning of July of this year, they obtained signatures in support of this application. Most of the signatures were written on a piece of paper on which was also written the following heading:

We the undersigned being employees of Cara Operations Ltd. Pearson International Airport Terminals one and two and members of United Food and Commercial Workers Local 1000A *do hereby apply to the Ontario Labour Relations Board for decertification of said contract.*

Please note that at no time has management discussed this subject with staff members and all signatures have been given of their own free will.

[emphasis added]

All of the signatures except one were obtained during Mrs. Young's scheduled time off from work. One signature was obtained in a restaurant over coffee near Mrs. Young's place of work. Mrs. Young composed and wrote the headings on the statements of desire and was accompanied by Miss Gattwald during the circulation of the statements of desire. Most of the signatures were obtained on the intervener's premises with some signatures being obtained in the homes of employees. No one from management was present when these signatures were obtained. Employees who were believed to be sympathetic to this application were the first to be asked to sign the statements of desire. Those who were believed to be unsympathetic to this application were among the last to be asked to sign the statements of desire. Two of the employees who refused to sign the statements of desire were Theresa Nott and Barbara Than.

7. The respondent, while it did not file allegations of irregular or improper conduct, opposed this application on several grounds. Firstly, the respondent alleged (i) that the employees perceived Mrs. Young to be proximate to and friendlier to management than other employees in the bargaining unit; (ii) that the bulk of the signatures were obtained on the

intervener's premises and during working hours; (iii) that Mrs. Young informed at least two employees that copies of the statements of desire were going to head office so that management could see who signed; and (iv) that there was evidence that there was a rumour among a number of employees that the statements of desire were going to head office for that purpose. The respondent also opposed this application on the grounds that the wording and form of the heading was not clear with respect to the intention and purpose to terminate the bargaining rights of the respondent. The respondent referred to and relied upon the words "do hereby apply to the Ontario Labour Relations Board for decertification of said contract". The respondent further opposed this application on what was admittedly a technical ground, namely, that there is a jurisdictional requirement that an application to terminate the bargaining rights of a trade union must be made by a member of the bargaining unit. It was the position of the respondent that in as much as the applicants are both members of the full-time bargaining unit, the jurisdictional requirements of section 57(2) of the *Labour Relations Act* have not been met by the applicants with respect to the part-time bargaining unit.

8. With respect to the alleged perception of the employees, the Board heard evidence from Mrs. Nott and Mrs. Than. Mrs. Young is a senior sales clerk and reports to her supervisor, Marg Waltho, when an employee is late or absent. Mrs. Young has known Marg Waltho for eighteen years, which is well before Mrs. Young became an employee of the intervener, and occasionally has coffee with Marg Waltho where they may be observed by employees. Mrs. Young also has a pass and access to the offices of the intervener and on a day off she used the intervener's equipment to make copies of the statements of desire when there were no members of management present. Mrs. Nott gave evidence that Mrs. Young, in the present of herself, Miss Gattwald and Iolanda Crescenzi, said that copies of the statements of desire would go to the respondent, the Board and the management so that management could see who had signed. Iolanda Crescenzi was not called as a witness. Mrs. Young and Miss Gattwald strongly denied that Mrs. Young had made such remarks. Mrs. Than, who was called as a witness by the respondent, testified that Mrs. Young did not make such remarks to her. In assessing the evidence on this point, the Board notes that Mrs. Nott was very hesitant in giving her evidence and that Mrs. Young and Miss Gattwald gave their evidence in a straightforward manner and were not shaken in cross-examination. Having regard to the demeanour of the witnesses, the Board accepts the denials of Mrs. Young and Miss Gattwald in preference to the evidence of Mrs. Nott and finds that Mrs. Young did not make the remarks attributed to her by Mrs. Nott. The Board is not prepared on the basis of the evidence before it to find that there was a rumour among the employees as alleged by the respondent. The fact that Mrs. Young openly had coffee with a friend of long-standing and has minor reporting functions to this friend in her capacity as a supervisor, could not, in our view, cause the employees to reasonably believe that Mrs. Young was proximate to management. This is particularly true when it is remembered that Mrs. Young was instrumental in initially having the respondent represent the employees and was serving as a shop steward for the respondent. The fact that Mrs. Young had access to a high security area such as the intervener's offices does not, in our view, endow her with any special privileges and status so as to cause the employees to perceive her as a representative of and acting on behalf of the management of the intervener.

9. The wording on the statement of desire referred to by the respondent refers to decertifying the contract instead, as the respondent argued, of decertifying or terminating the bargaining rights of the respondent. In the view of the respondent, the document must be clear on its face when it was signed. The burden of proving on the balance of probabilities that a petition represents a voluntary statement of desire on the part of the employees who signed it lies upon the objectors. See, for example, *Leamington Vegetable Growers Co-operative*

Limited, [1974] OLRB Rep. June 402 and *Fibre Therm Corp*, [1980] OLRB Rep. Aug. 1196. Included in this burden of proving is the requirement to satisfy the Board that the wording and the form of the document at the time the employees signed it were such as to make the intention and purpose of the document clear and unequivocal in the minds of the persons who signed it. See *Armbro Materials & Construction Ltd.*, [1976] OLRB Rep. Nov. 743. In our view, the heading on the statement of desire quite plainly refers to an application to the Board for the purposes of decertification. The correct name of the respondent is referred to in the heading and on a fair reading the heading refers to an application to decertify the respondent. While the heading could have been more precisely expressed by using the word “union” instead of “contract”, the use of the word “said” is meant to refer to “United Food and Commercial Workers Local 1000A”. The word “said” can refer to nothing else in the context of the heading. The Board adopts the reasoning in *Genwood Industries Ltd.*, [1976] OLRB Rep. Aug. 417, at page 419:

It is the intention of section 49 [now section 57] that it shall be the primary concern of the Board to ascertain the wishes of the employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes would be unnecessarily fettered, if we were to adopt the “forms of action” approach suggested by Mr. Sack. The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act.

10. The Board now considers the jurisdictional argument raised by the respondent. Section 57(2) of the *Labour Relations Act* states:

Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,. . .

As has been stated earlier, Mrs. Young and Miss Gattwald are members of the full-time bargaining unit and are not members of the part-time bargaining unit. Is this application, in so far as it relates to the part-time bargaining unit, properly before the Board? As the Board stated in *St. Michael's Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023, the wording of section 57(2) leaves no doubt that any employee in the bargaining unit defined in a collective agreement may apply for a declaration that the trade union which is a party to that collective agreement no longer represents the employees in that bargaining unit. The question is, did any employee within the part-time bargaining unit make an application for a declaration terminating the bargaining rights of the respondent with respect to the part-time bargaining unit as required by section 57(2)?

11. The question to be determined is, on the facts before the Board, who is or are the true applicants and whether they are the employees referred to under section 57(2)? The respondent represents both bargaining units of employees of the intervener in two similar but separate collective agreements. The applicants have defined in the application the two bargaining units. The Board was able to make the preliminary counts at the hearing with respect to

both bargaining units so as to cause the Board to inquire into the voluntary signification of the employees in writing in support of this application. The statements of desire have been signed by the employees in both bargaining units. While Mrs. Young and Miss Gattwald are the nominal applicants in this application, in our view, when the formal application in Form 17 and the statements of desire are considered together, the application has been made by employees in both bargaining units and employees in both bargaining units have applied for a declaration that the respondent no longer represents them as their bargaining agent. See *St. Michael's Shops of Canada Limited, supra*.

12. Having regard to the evidence and representations before it, the Board is satisfied that not less than forty-five per cent of the employees of Cara Operations Limited (Retail Stores Division) in each of bargaining units #1 and #2, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on July 18, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

13. The Board directs that representation votes be taken of the employees of Cara Operations Limited (Retail Stores Division) at Terminal 1 and Terminal 2 at Toronto International Airport in bargaining units #1 and #2. Those eligible to vote are the employees in bargaining unit #1 and bargaining unit #2 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

14. Voters in bargaining units #1 and 2 will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Cara Operations Limited (Retail Stores Division).

15. The matter is referred to the Registrar.

2282-83-U Abdul Chafchak, Complainant, v. United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and its Local 195, Respondent, v. **Central Stampings Limited**, Intervener

Damages — Duty of Fair Representation — Reconsideration — Remedies — Unfair Labour Practice — Board finding breach of representation duty and directing referral of grievance to arbitration — Apportioning liability for loss wages between employer and union if arbitration successful — Grievor and employer agreeing to avoid arbitration and accept reinstatement — Whether agreement extinguishing union's liability for back wages — Whether agreement causing Board to reconsider referral to arbitration and decide merits of grievance

BEFORE: M. G. Mitchnick, Vice-Chairman.

APPEARANCES: *Rodney M. Godard, Amita Sud and Abdul Chafchak for the complainant; B. Chercover and Ted Murphy for the respondent; Jean L. Marentette and Robert Dupuis for the intervener.*

DECISION OF THE BOARD; October 4, 1984

1. This is the continuation of a complaint filed under section 89 of the *Labour Relations Act*, alleging “non-compliance” with the prior decision of the Board.

2. The complaint initially alleged that the respondent trade union acted arbitrarily in withdrawing the complainant's discharge grievance from arbitration, in contravention of section 68 of the *Labour Relations Act*. The Board in a decision dated February 24, 1984, found that allegation to be valid, and, after upholding the complaint, went on to deal with the matter of remedy as follows:

The appropriate relief is to send the grievance to arbitration. The Board must consider how financial liability for back pay is to be apportioned if Mr. Chafchak succeeds before an arbitrator. In that event, the union's violation of section 68 would have increased the duration of the period of unemployment for which back pay is owing. The employer ought not to bear the financial liability for the loss attributable to the union's misconduct. Therefore, if the grievance succeeds, the employer's liability should be restricted to the period after the date of this decision. This liability is roughly equivalent to that to which the employer would have been exposed had the union voluntarily carried the grievance to arbitration in the first place. Any loss arising between the dismissal and the date of this decision ought to be shared between the complainant and the respondent. He bears some responsibility for this loss because of his delay. But union officials are also partly responsible for his plight, because they violated section 68 and even an aggrieved employee who launches a complaint with reasonable speed would not obtain redress from the Board until a substantial amount of time had elapsed from the abandonment of the grievance. Recognizing that any estimation lacks precision, I would fix this period at four months. The union is responsible for losses incurred in this period. As the total period for which liability is to be shared between the union and the complainant is approximately twenty months, the union ought to hold liability for 4/20ths of the

total loss over this time span. The residual loss should rest with the complainant. This contingent order concerning damages subjects the union to conflicting interests at arbitration — if the grievance is won the union will be exposed to financial liability. In response to this conflict of interests, we direct the respondent to retain counsel jointly chosen by the union and Mr. Chafchak. This direction is analogous to one made in *Leonard Murphy*, [1977] OLRB Rep. Mar. 146. Such an order is also in keeping with the practice of other labour relations boards. See *Adams*, [1976] 1 Can. LRB 192 (B.C.); and *Massicotte*, [1980] 1 CLRBR 427 (Can) upheld sub. nom. *Teamsters v. Massicotte*, [1982] 1 S.C.R. 720.

The Board directs that:

- (a) the respondent forthwith submit Mr. Chafchak's grievance to arbitration for a hearing on its merits;
- (b) the intervener forthwith take any steps necessary to bring the grievance to arbitration and waive any preliminary objections to a hearing on the merits;
- (c) in the event the grievance is upheld and a board of arbitration makes an order for compensation, the respondent pay one-fifth of the amount owing for the period between August 3, 1982 and the date hereof and the complainant be denied compensation for the rest of the loss incurred during this period.

A posting of a notice to employees is not directed because counsel for the complainant did not request a posting and the facts at hand are not such as to prompt the Board to direct a posting on its own motion.

3. Following receipt of this decision, the union sent notice of arbitration to the company concerning the complainant's grievance, and agreed that the complainant's lawyer at the section 68 hearing, Mr. Godard, could represent the union and the complainant at arbitration (provided the complainant paid one-half of his lawyer's fees). The effect of the Board's decision, of course, was to render the company liable to pay the grievor compensation only for the period *subsequent* to the issuance of the Board's February 24th decision, and to leave the respondent trade union liable for the first four months of any back-pay awarded for the period running from the date of discharge to the Board's February 24th decision. The company was quick to assess the position it was in, and immediately agreed to reinstate the complainant rather than proceed to arbitration. The conditions which the company imposed on its willingness to re-instate the grievor was that no compensation would be claimed for the short period from the date of the decision to the date of actual reinstatement, and that some form of discipline would appear on the employment record of the grievor. Negotiations took place with Mr. Godard, on behalf of the complainant, and on March 22nd the complainant was called into the company's personnel office and was requested to sign a "Demerit Slip" setting out the basis for not proceeding with his grievance to arbitration. For reasons not alleged by the complainant to be improper (in terms of any conduct on the part of the company), the grievor signed the Demerit Slip on the spot, without seeking further advice on it from either his lawyer or the union. The Demerit Slip read:

NAME: Mr. Abdul-Rahman Chafchak
 DATE: March 22, 1984
 BADGE #: 129

REASON FOR DEMERIT: This is to confirm the arrangement made with respect to the return to employment of Mr. Chafchak. The parties agree not to proceed to an arbitration hearing with respect to the discharge. It is agreed Mr. Chafchak shall be reinstated to his employment with the Company as of Monday, March 26th, 1984 at 6:45 a.m. It is further agreed that the discharge previously imposed shall be removed from his record and in its place there shall be considered a period of suspension *from the date of the discharge to the date of the reinstatement*. The parties agree and acknowledge that Mr. Chafchak has no claim against the Company for any compensation whatsoever during the period of suspension.

(emphasis added)

4. On the following day, Mr. Godard became aware of the contents of the Demerit Slip, and immediately sought confirmation from the union's representative in this matter that the union would nonetheless comply with what he perceived as the union's obligation to pay to the complainant 4 months' wages in compensation for its violation of section 68. Mr. Murphy declined to give such an assurance, pending consultation with the union's solicitors. Shortly thereafter, Mr. Godard was in receipt of a letter from union counsel asserting the position that the terms of the bilateral settlement of the grievance between the complainant and the company put an end to any further liability for the union under the terms of the Board's February 24th decision. The complainant, in the meantime, returned to work on March 26th, as had been agreed, and has continued at work ever since.

5. Counsel for the complainant concedes that the only way his client can recover from the union under the terms of the Board's order is for a board of arbitration to determine the merits of the grievance, and to award both reinstatement *and* back pay. He submits however, that the principal issue of reinstatement has now been settled, and that it makes no sense to require the complainant to proceed with his grievance to arbitration, particularly since the company has no further interest, and that step would produce the anomalous situation of the complainant and his trade union being the only combatants at arbitration. Counsel argues that in the circumstances which have developed, the Board should instead reconsider its deferral to arbitration, as set out in the original decision, and assess the merits of the complainant's grievance on its own. Counsel submits that the Board could then, if satisfied by the complainant's evidence, modify the terms of the Demerit Slip signed by the complainant to reflect the length of suspension, if any, which the Board itself considers appropriate. This request for "rectification" as counsel put it, of the Demerit Slip, was based on the assertions by both parties to the reinstatement agreement that it was not intended to prejudice the complainant's claim for compensation against the respondent trade union.

7. As can be seen, the complainant's prayer for relief is not really in the form of an allegation of non-compliance, as the original request for a hearing had suggested. The respondent trade union has in fact done that which was required of it by the Board decision to this date: it gave notice to the employer of its intention to process the complainant's grievance to arbitration, and it agreed to the complainant's selection of an advocate to represent him at the arbitration (the Board makes no comment upon the fee-sharing upon which the respondent's

consent was based, since the complainant indicated its acceptance of that arrangement). The fact that the grievance is not now proceeding to arbitration for the kind of determination upon which further union liability was made conditional is not, as the respondent's counsel asserts, any fault of the respondent, and indeed, the respondent was not consulted on the agreement giving rise to the present problem. In recognition of all of this, the complainant, as noted, now puts his case on the basis of the Board's power to reconsider its decision on the appropriateness of arbitration as a basis for relief, in light of the intervening settlement of the reinstatement issue with the employer. The question before the Board, therefore, is whether it ought to reconsider its remedial order of the first instance, and now direct that the merits of the complainant's grievance be litigated directly before it.

8. In response to the matters raised before it, the Board would note at the outset that it perceives no conflict of interest whatever in the position of the complainant's counsel, Mr. Godard, in this matter. The provision in the Board's original decision for the selection of counsel on a joint basis clearly contemplated that counsel would pursue without distraction the interests of the *complainant* with respect to the handling of his grievance. This became necessary because the Board's apportionment of liability created the unusual situation of the trade union having an interest diametrically opposite to the member on whose behalf it had been directed to advance the grievance. To eliminate even the *perception* that the trade union might, in light of this conflict, not be doing its utmost for the grievor at arbitration, the grievor was given the right to select an advocate in whom he had confidence. Because the trade union continued to be responsible for the legal fees incurred in presenting the arbitration, however (as it would have been had it not "arbitrarily" withdrawn the grievance in the first place), the Board gave the trade union the right to approve of the complainant's selection of counsel as well. Counsel is not, however, meant to be placed thereby in a position where he serves two masters — that would resurrect precisely the kind of conflict situation that the choice-of-counsel provision was meant to eliminate. Rather, the counsel so selected is expected to act at all times in the interest of the grieving employee, and that is exactly what Mr. Godard has done in this case.

9. Whether the unsuccessful trade union in a section 68 complaint is entitled to do any more than assume a passive role at the subsequent arbitration (as opposed to entering the fray on the *employer's* side) need not be decided here. The fact is that both the employer and the complainant chose to avoid the down-side risks of arbitration, and the entire question of discipline has been dealt with by the terms of the Demerit Slip agreed to and signed by the complainant. The complainant agreed therein not only to give up all claims to compensation from the company for the short period of time subsequent to the Board's section 68 decision, but also agreed to the substitution of a suspension for the *full* period from the date of discharge to the date of reinstatement, just as an arbitrator might have done. Whether or not both parties say they intended to at the time, the effect of that resolution of the penalty is also to eliminate the basis for any claim for "damages" by the complainant against the trade union. That that is the position the complainant has placed himself in appears to be acknowledged by his counsel, in seeking to have the Board "rectify" the term of the suspension set out in the Demerit Slip.

10. The employer as well, however, now has a legitimate claim to upholding the terms of the Demerit Slip as written. That Demerit Slip represents the settlement of the complainant's grievance vis-a-vis the company, and the settlement was actually implemented on March 26th, when the complainant, Mr. Chafchak, was returned to work. The complainant does not allege that any duress or undue influence on the part of the company caused him to sign the Demerit slip before consulting the solicitor actively representing him in this matter, but simply relies on the fact that neither party to the settlement was intending to prejudice the complainant's

claim against the union as a result. That the union might view the settlement as doing just that became apparent the day after it was signed, when counsel for the complainant unsuccessfully sought confirmation of the union's acceptance of its obligation continuing in spite of the settlement with the company. Yet no alteration was made to the terms of the settlement, embodied in the Demerit Slip, prior to the complainant returning to work three days later, on March 26th. Indeed, the complainant has continued in employment for some six months now, with no alteration in the terms of the Demerit Slip. The only offer by the company during that period to change the terms of the settlement originally agreed to came in a letter dated April 11, 1984, which read:

Attention: Rodney M. Godard, Esq.

Dear Sirs:

RE: CENTRAL STAMPINGS and ABDUL
CHAFCHAK

I acknowledge receipt of your letter of April 6th, last.

Without commenting on the accuracy of the statements made therein, it is clear that our position was not to prejudice Mr. Chafchak's claim against the union for the four months compensation. For that reason, we provided you with the amount. The company is prepared to change the terms of the demerit slip and substitute a lesser period of suspension. *Any step will, of course, have to be approved by the union.*

Mr. Edmundson did not draft the demerit slip but I provided him with the wording.

Yours very truly,
BARTLET & RICHARDES

(emphasis added)

As can be seen, the company's letter, notwithstanding the opening statement of paragraph two, made any change in the terms of the settlement conditional upon approval by the union. The company, when asked by the Board, offered no other basis upon which it was agreeable to modifying the settlement it entered into, and after six months of employment of the complainant pursuant to that settlement, the Board is not prepared to force any alteration of its terms upon the company. The union itself has approved no alteration in the terms of settlement, nor is it likely to if the only effect of such is to permit the other two parties to frame a deal which leaves only the interests of the union unaccommodated. We do not, in this case have to decide what effect a two-party deal in such terms would have had on the liability of the third-party union under the conditions of the Board's initial award. The fact is that the agreement entered into without the union in this case does have the effect of eliminating any basis for the complainant's claim against the union, and the terms of that settlement are in effect today.

11. The Board finds on the facts before it that the complainant, in order to ensure reinstatement and avoid the uncertainties of arbitration, has freely negotiated, and implemented, a settlement with the employer which has the effect of extinguishing any basis for

a damage-claim against the union, and the request for reconsideration of the Board's remedy is denied.

0828-84-R;0829-84-R International Association of Machinists and Aerospace Workers Local Lodge 1740, Applicant, v. **Do-Tan Manufacturing Limited**, 414655 Ontario Limited, carrying on business as Tanner Industries and J. R. Tanner, Respondents

Related Employer — Sale of a Business — Principal of insolvent business assembling physical assets necessary for family members to continue part of business — Goodwill and connections with customers transferred to new business — Sale of part of business — Board not convinced common control will continue — Not exercising discretion to make related employer declaration

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members D. H. Blair and H. Kobryn.

***APPEARANCES:** James Hayes, George Drennan, Sheila McIntyre and Lloyd Bradt for the applicant; no one for the respondent Do-Tan; Patrick Mazurek for Tanner Industries and J. W. Tanner.*

DECISION OF THE BOARD; October 29, 1984

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2. These are simultaneous applications pursuant to section 63 and section 1(4) of the *Labour Relations Act*. They were not argued in the alternative by the applicant. The remedies the applicant seeks are:

- (1) A declaration that 414655 Ontario Limited carrying on business as "Tanner Industries" is a successor employer to Do-Tan Manufacturing Limited.
- (2) A declaration that "Tanner Industries" is a related employer to Do-Tan Manufacturing Limited.
- (3) A declaration that Tanner Industries is bound by the terms of the collective agreement between Do-Tan Manufacturing Limited and the applicant.

Since no remedy is sought against J. R. Tanner, we hereby dismiss both applications against him.

3. We find the following as facts. Do-Tan was founded in 1974 upon the liquidation of John Bertram Machine Tool Co. (hereinafter "Bertram"). Its initial core activity was tool

and gauge manufacturing. By 1976 its activities and prospects had expanded to warrant the change of name from the specific "Tool and Gauge" to the general "Manufacturing". By its last full fiscal year of operation (October 1981 — October 1982), Do-Tan had three divisions:

- (a) The tool and gauge division which produced specialty items such as taps, cutters and plate punches for major steel producers like Stelco and manufacturers like John Deere and International Harvester. This division generated about 13% of sales.
- (b) The off-load vehicle division which produced materials related to winching and modified Timberjack machines for provincial hydro facilities and a few foreign customers. This division generated about 43% of sales.
- (c) The woodlands division which produced carbide saws, chopper blades, planer knives and chipper knives used in the forest and housing industries (about 43% of sales).

In addition there was also a very small "spare parts" operation whereby Do-Tan manufactured small parts (usually a screw or nut for a lathe), from original Bertram "drawings", stored on the premises of Do-Tan, but owned by Ormstein and Koppel, for owners of aging machines originally made by Bertram. In the last fiscal year gross revenue from this small parts manufacturing amounted to \$15,000. Gross sales in that year amounted to \$6.2 million, a decline of .8 million from the previous fiscal year. Between October 1982 and June 1983 when Do-Tan ceased its operations, gross sales were between 3.5 to 4 million. The appraised value of all of the assets (excluding intangibles) was over \$3 million.

4. Do-Tan and the applicant were bound by a collective agreement, the term of which was "from April 1, 1979 through March 31, 1982". This collective agreement was renewed with changes, not material to this case, on April 15, 1982 for a term of one year from April 1, 1982. At the time of Do-Tan's demise there were approximately 30 employees in the bargaining unit:

All production and maintenance employees located at its Dundas, Ontario, plant save and except office administrative and laboratory staffs, superintendents, foremen, watchmen, guards and time study men and any other classifications set forth in the certificate issued by the Ontario Labour Relations Board.

(paraphrase of Article 2.01 in the collective agreement)

Article 38 — Duration — provides that:

"... the collective agreement shall continue from year to year after that date, unless either party gives notice in writing of its intention to terminate this Agreement, or to enter into negotiations for the purpose of amending the Agreement, within a period of not less than (60) sixty days and not more than (90) ninety days prior to any yearly date of termination".

As a result of this clause, we find that the collective agreement continued in force and effect after March 31, 1984 unchanged and that, as of the date this application was brought, the

collective agreement was in the first 2 months of operation for its April 1, 1984 to March 31, 1985 term.

5. In November 1982, Do-Tan's bank called its demand loan. This did not culminate either in bankruptcy proceedings or in a receiver being appointed either by the Court or pursuant to the bank's debenture. Instead, the disposal of Do-Tan was "supervised" by an agent of the bank. J. R. Tanner (hereinafter referred to as "Mr. Tanner") negotiated a deal with the bank that he would receive a commission on anything he was responsible for selling. When efforts to sell the totality of Do-Tan as a going concern failed by March of 1983, the decision was made to sell the operations by division. Ultimately, a three-day auction held in June resulted in the sale of the equipment. Previous to this other equipment had been sold to a variety of buyers, in some instances to competitors. As sales progressed, production wound down and employees laid off. The last notice of layoff was given to remaining employees in May 1983, effective June 30, 1983. By the end of June much of the equipment and assets were sold and all of the employees had been laid off or had transferred to new employment with the purchases of the equipment. Some \$250,000 worth of machinery remained, some of which was sold during July and August. Even after the auction, the full debt to the bank had not been repaid.

6. Ownership in Do-Tan was:

Mr. Garth Doel — 74%

Mrs. Doel — 1%

J. R. Tanner — 24%

Margaret Tanner — 1%

Mr. Doel and Mr. Tanner had been Vice-President and Works Manager, respectively, with Bertram. Together they had purchased Bertram, sold a part of it and, around the tool and gauge business, had built Do-Tan into the business set out above. Mr. Tanner was Vice-President and General Manager of Manufacturing while Mr. Doel was responsible for the off-load vehicle division and financing, marketing and sales for all divisions. We received no evidence as to Mrs. Doel's role, if any, in Do-Tan but we received evidence from Margaret Tanner, wife of J. R. Tanner, (hereinafter referred to as Mrs. Tanner) that while Do-Tan was operational, she "filled in" doing accounts receivables, payroll and typing work. After June of 1983, she did mail sorting and delivery for Do-Tan, gave information to prospective purchasers of Do-Tan equipment and once a week showed them the equipment available. Prior to June 1983 Mr. Tanner was engaged in winding the operation down and trying to sell Do-Tan. At some point he examined the possibility of starting a new business up but could not get financing. After June 1983 Mr. Tanner was engaged in a number of activities. Initially, he continued to sell or try to sell the remaining equipment. In September he appeared on Do-Tan's behalf at an arbitration hearing dealing with a grievance lodged in the previous year by an employee laid-off in November of 1982. Do-Tan received the decision of the arbitration board dated October 11, 1983 upholding the grievance. We received no evidence as to when this was received by Do-Tan but someone's date stamp on the copy of the award put into evidence is October 28, 1983. The board found that the layoff of an employee in November of 1982 was improper and ordered compensation from that time. On December 2, 1983 Do-Tan received an assessment from the complainant indicating that the compensation owed to the aggrieved employee was \$14,764.66. During the time between Mr. Tanner realizing he could not get financing for a new operation large enough to support him and October 1983 Mr. Tanner looked for employment for himself. He was unsuccessful in finding anything in the Hamilton area and ultimately secured employment with Universal Grinding in Brockville in October. Since becoming employed in Brockville,

Mr. Tanner has driven home to 16 Maple Avenue, Dundas, where Mrs. Tanner and at least one son, Andrew continue to live.

7. There is no question that Mr. Tanner's family did not want to move away from the Dundas area. During the winding-up of Do-Tan's operations, Andrew and Mrs. Tanner asked him "what can we do to keep you home?" Mr. Tanner's answer was "nothing". However, Mr. Tanner then thought that it may be possible "to set something up for (his) two boys, Andrew and Graham" both of whom were at the time still in school. He noted in or around September that the equipment used for manufacturing punches had not yet been purchased. However, he also knew there were no orders and "I was not in a position to buy equipment unless there was an indication I could get the work for it". To get the necessary orders he contacted Stelco and Fiberglas Canada. Stelco was one of the major customers of Do-Tan's tool and die divisions and Fiberglas was a large purchaser of chopper blades made by Do-Tan. Mr. Tanner approached both Stelco and Fiberglas to try to persuade them to give their business to a new entity. In approaching them he did not take either Andrew or Graham along, rather he took his brother (34 years old with prior experience of three years as supervisor at Do-Tan). It is unclear from the evidence who Mr. Tanner advised would operate the new business, his sons or his brother or both. Both Stelco and Fiberglas agreed to Mr. Tanner's overtures provided the service and quality were there. The attractiveness of these customers was that Stelco required no outlay for material and Fiberglas work could be done on a subcontracting basis in other shops Mr. Tanner was familiar with. Mr. Tanner also secured permission from the President of Ormstein and Koppel for Tanner Industries to use the Bertram designs still on site at Do-Tan. Having secured Stelco's and Fiberglas' commitment, Mr. Tanner, on advice from Do-Tan's accountants, paid back taxes on a dormant numbered company (414655 Ontario Limited) and, as of December 15, 1983, became its president. However, Mrs. Tanner and Andrew held all the shares, 51% and 49% respectively. Its head office was and is 16 Maple Avenue, Dundas where Andrew continues to live. By November a lease on suitable premises in Soney Creek had been located. It is unclear in whose name the lease was taken. Mr. Tanner testified that the creation of "something" after Do-Tan was for the benefit of his sons. However, it is clear from the evidence that Mr. Tanner's brother, who was unemployed at the time, did "all the initial setup", including making the leasing deal for the premises. Andrew worked with Mr. Tanner's brother on a part-time basis between November 1983 and March 1984 the period during which he completed studies at Mohawk College. Machinery owned by Do-Tan — 3 milling machines, 1 turret lathe, (parts of these four machines, e.g. cutting bits, heads were missing) 1 power hacksaw — was purchased by Mr. and Mrs. Tanner. No money changed hands, however, because the agent for the bank agreed that the value of the equipment equated with some or all of the money owing to Mr. and Mrs. Tanner for various services they performed during the wind-down. These services included the sale of equipment after the auction (for which Mr. Tanner received a 15% commission), caretaking services for the Do-Tan plant, fielding calls from creditors and personal out-of-pocket expenses for plumbing repairs made at the Do-Tan plant in January 1984. The value of the equipment transferred was agreed to be \$3,000.00, the price similar machinery fetched at the auction. Mr. and Mrs. Tanner also provided a couple of thousand dollars of capital to the new company to facilitate retooling of the machines to produce or partially produce the product lines which Do-Tan had previously produced for Stelco and Fiberglas.

8. Between November 1983 and March 1984 Mrs. Tanner's brother ran the new company, whose business name at some point became Tanner Industries. During this time Andrew was completing his studies and only worked at Tanner Industries part time. Mr. Tanner worked during the week in Brockville and returned home on weekends. He advised the new company

throughout. Tanner Industries succeeds in fulfilling the contracts with Stelco and Fiberglas and contracted out all the small parts aspect so that after 8 months of operation, its gross sales were:

- (a) chopper blades sold to
Fiberglas Canada — \$30,000.00
- (b) punches — sold to Stelco — \$30,000.00
- (c) spare parts — to various
customers — \$ 7,400.00

It is notable that Mr. Tanner indicated that annual gross sales by Do-Tan of chopper blades to Fiberglas “never went above \$30,000 — \$35,000” and that annual gross sales by Do-Tan of plate punches to Stelco were between \$10,000 to \$25,000. Gross sales of spare parts had been \$15,000 per annum. The Stelco work is described by Andrew as a “once a year” bid for a one-year duration. The Fiberglas work requires a call being made to inquire as to their stocks and making blades accordingly.

9. In March of 1984 Mr. Tanner testified he and his wife “gifted” to Andrew for his 21st birthday their investment in Tanner Industries. Except for Mr. Tanner’s relinquishing of the office of President (which he denied ever being conscious of holding) we have no evidence of anything actually occurring or changing to show a gift had been made by Mr and Mrs. Tanner to Andrew. Mrs. Tanner, not Andrew, became President and Secretary and she continued to hold 51% of the shares of the new company. Mr. Tanner’s brother, who had never had any ownership stake in Tanner Industries, left in March. Andrew having completed his community college courses, concentrated his efforts on Tanner Industries. Mrs. Tanner continued doing the office duties required, drawing pay for the first time in April of 1984. Mr. Tanner continued to work in Brockville. Mr. and Mrs. Tanner’s other son, Graham, declared that he did not want to have anything to do with Tanner Industries. From January 1984 Tanner Industries has employed a number of people, some former Do-Tan employees, on an *ad hoc*, less than full-time basis. They are:

- (1) J. R. Tanner’s brother — whose activities are outlined above.
- (2) J. Vostry — who punches Tanner Industries saws in an automotive press shop.
- (3) Bob Killen — who files and grinds saws on Tanner premises 10 hours per week.
- (4) Frazer McGregor — who helps Andrew and Killen when they get “too busy”. He has worked 10 weeks.
- (5) Jim Campbell — who assists Andrew in repairing machines which do not work properly.
- (6) Graham Tanner — who very occasionally drops in to help.

Essentially, there are no full-time employees. Messrs. Killen, Campbell and Vostry had worked for Do-Tan in the bargaining unit and in excluded positions.

10. A lot of the rest of Do-Tan's hard assets went to other corporations, with no connection with Do-Tan. Generally, the purchases were arranged so that, if possible, the employees of Do-Tan would move with the equipment. Some of the equipment went to Mr. Doel and Do-Tan's chief engineer. Mr. Doel set up a design company and thereby picked up design work for the Department of Forestry, which would normally have dealt with Do-Tan. The chief engineer started up a company, taking Do-Tan's welder and maintenance man and they are currently handling two "Government contracts" which Do-Tan would have had. Neither the complainant nor the respondent attempted to join either of these corporations in these proceedings.

11. Having considered all of the evidence and representations of the parties, we have concluded that what occurred between Do-Tan and Tanner Industries falls within the provisions of sections 63(1) and (2) which provide:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

The Board in *Raymond Cote*, [1968] OLRB Rep. March 1211, had this to say regarding the meaning of the word "business", at paragraph 6:

... The meaning to be attached to the word "business" depends to a great extent on the nature of the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is "the totality of the undertaking". The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing a profit to assure its success. The total of these things along with certain intangibles such as goodwill constitute a business.

This theme was subsequently elaborated upon in *The Tatham Company Limited*, [1980] OLRB Rep. March 366, at paragraph 26:

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets — physical plant machinery and equipment — may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

In *Riverview Manor*, [1983] OLRB Rep. Sept. 1564, at paragraph 30, the Board had this to say about the movement of assets, together with customers, between two entities:

30. . . . assets and customers together do constitute a business. There are several cases in which the Board has enforced collective agreements and bargaining rights against a successor who purchased all or most of a predecessor's assets and began to service its former clientele. A review of some of these decisions demonstrates that a successor may acquire its predecessor's customers in several different ways. Two that are obvious are a covenant not to compete and the purchase of a name or trademark. In *Dennis Moran Limited*, [1977] OLRB Rep. Apr. 237, the successor bought virtually all of the predecessor's assets — including a gravel pit, equipment and licences — as well as its name. However, the Board has recognized that customers can pass between employers by other means. The habits of consumers with respect to grocery stores were discussed in *Dutch Boy Food Markets*, 65 CLLC 16,051, in which a store lease and all leasehold improvements passed between employers:

Had Kitchener Food only purchased the contents of the premises at 274 Highland Road and moved them into other premises we would have no difficulty in finding that the transaction was only the sale of assets. In the instant case, however, Kitchener Food acquired not just assets, but Steinberg's entire interest in the premises. Stated another way Steinberg's disposed of its entire operation in the Kitchener area which obviously must have had some effect on its operations in Ontario. If by the terms of the transaction Steinberg's had been restricted from

carrying on business in the same area we would have no hesitation in saying that there was a sale of a “business” within the meaning of section 47a [now 63] of the Act. The absence of such covenant, however, is not by any means conclusive that there was not a sale of a “business”.

A retail food supermarket, unlike some other businesses, has no customer orders or lists which can be transferred to a purchaser who intends to carry on the same type of business. By the very nature of a retail food business, with the exception of the name, a vendor has no goodwill which he can effectively give or withhold from a purchaser. The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. *Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located on the same premises. If there was any goodwill to be acquired by Kitchener Food it was inherent in the premises themselves in which Steinberg's had carried on the same type of business as that carried on by Kitchener Food.* Accordingly, the exemption of goodwill from the purchase price, in our opinion, has no real meaning.

(emphasis added)

The peculiar nature of customer relations in the storage business was acknowledged in *Big Bear Storage*, [1979] OLRB Rep. Mar. 164, a case involving the transfer of a warehouse lease and associated equipment:

10. In this case the respondent purchased certain assets of the successor (two motors, racks, office equipment) necessary to the operation of a warehouse business and in a separate transaction acquired leased access to the same premises as the predecessor under almost identical terms and conditions. The significance of the second transaction cannot be overstated in the context of the warehousing industry where *goods stored on the premises by the predecessor's customers remain there as of the date the successor occupies these premises.*

(emphasis added)

In all of these cases, both assets and clientele passed from one employer to the other, and a sale of a business was found to have occurred.

Finally, the Board in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, at paragraph 35 stated:

35. In assessing the facts from which a transfer of a business may be inferred, the Board has always been especially sensitive to any pre-existing corporate, commercial or familial relationship between the predecessor and the alleged successor; or between the predecessor, the alleged successor and a third party. Transactions in these circumstances require a more careful examination of the business realities than do transfers between two previously unrelated business entities. The presence of a pre-existing relationship may suggest an artificial transaction designed to avoid bargaining obligations;

or (more commonly) there may be a transaction in the nature of a business re-organization which does not alter the essential attributes of the employer-employee relationship, and which should not, having regard to the purpose of section 55 [now 63], disturb the collectively bargained framework for that relationship. A business may have created a new legal vehicle to carry on all or part of its activities, or it may have redistributed those activities among its existing legal components without changing its essential character or the identity of its real principals or proprietors. The separate legal identity of the components may be superfluous from an economic view point, and there may be an *actual* transfer of business activity from one to the other, even though there is little evidence of a transfer of tangible assets, goodwill, etc. In reality, the employer's business may not be exclusively "his" to transfer, for a common principal, shareholder or corporate parent may have the effective power to extinguish an apparently independent business and transfer its economic functions to another. If both businesses are also "in the same business", (i.e., supply the same product in approximately the same way and potentially to the same market or customers) a transfer of a business may have occurred but may be very difficult to detect. In such circumstances it may be important to carefully examine the pre-existing links or lines of common control to which the alleged predecessor and successor are both subject. Such examination is precisely what is undertaken by the Board on an application under section 1(4); but it is also relevant on section 55 applications, and it for this reason that applications commonly plead section 1(4) in the alternative. It would be incorrect to make this consideration a decisive "test" for successorship; but where there is a pre-existing corporate connection between the predecessor and the successor the Board has been disposed to infer a "transfer" if there is the slightest evidence of such transaction. (See: *Zehrs Markets*, [1975] OLRB Rep. Jan. 48). The pre-existing "nexus" between the respondents inevitably colours the Board's view of facts. As a practical matter, it is much more difficult to sustain the contention that one has not acquired a predecessor's business but merely founded a new, independent, but similar, business serving the same market. (See, for example: *Thorco*, *supra* (65 CLLC ¶16,052) where a firm closed down one of its manufacturing operations and transferred its equipment to a recently incorporated related company; or *Gordons Markets*, *infra*, paragraph 40. In both cases the transaction also looked like a scheme to avoid bargaining rights.)

12. We find that the "part of the business" transferred to Tanner Industries was the equipment owned by Do-Tan and the know-how and customer contacts of Mr. Tanner developed as an owner of Do-Tan. These assets and customers assembled through the instrumentality of Mr. Tanner form a part of the business of Do-Tan and were transferred to the benefit of Tanner Industries. Mr. Tanner, as principal of Do-Tan, not only assembled for the members of his family the physical assets necessary for the continuation of a part of Do-Tan's business but, through his active intervention with customers of Do-Tan, secured the actual continuity of that part of the business as well. Although only a small segment of Do-Tan's business, while it was a going concern, has been transferred we find it is nevertheless a "definable part of the economic functions" formerly performed by the predecessor (see *Vaunclair Meats*, [1981]. OLRB Rep. May 581). The facts before us are distinguishable from the cases mentioned in the respondent's submissions. In the *Norjohn Contracting* case, [1978] OLRB Rep. May 438,

the vendor continued to operate in the same business, did not sign a non-competition clause and retained a key trade name. The Board properly found there was no sale in that instance because of these factors. In the fact situation before us Do-Tan has ceased operation and it is unlikely Mr. Tanner or anyone else from Do-Tan will be competing with Tanner Industries in the areas of operation it has set up. For this reason and the close family ties, the absence of a non-competition clause is not determinative. The *Brantford Concrete Pipe Company Limited*, [1966] OLRB Rep. Dec. 731 case referred to by the respondent is also distinguishable. In that case no sale was found because the successor did not acquire inventory, *customer lists* or *goodwill* in the transaction and, therefore, was seen as acquiring a “mere idle collection of assets”. In the facts before us the goodwill of Do-Tan (Mr. Tanner’s connection with two major customers) were effectively transferred to Tanner Industries. In the case of the small parts manufacturing aspect Mr. Tanner allowed Tanner Industries to use the plans stored on Do-Tan’s premises and under permissive use from Ormstein & Koppel. Mr. Tanner admitted that the first step in the process of setting up Tanner Industries was securing the customers. The subsequent steps, i.e., paying back-taxes on the numbered company, leasing of premises, acquisition of equipment and re-tooling of it were based upon it. There was no significant hiatus in operations between Do-Tan’s cessation and Tanner’s start-up to allow us to conclude that Mr. Tanner’s influence was dissipated, as was the case in the *Raymond Cote* case, *supra*. We also consider it important to note that the way the customers of Tanner Industries were assembled was by Mr. Tanner, accompanied by his brother meeting with them. Andrew was not a part of the overture nor the key component as was Raymond Cote in the case of the same name, *supra*.

13. Insofar as the section 1(4) application is concerned, while the ingredients of common control and direction may have been present for a period of time between October of 1983 continuing up to March of 1984, we are not necessarily convinced this is going to be an ongoing feature of Tanner Industries operation. The bargaining rights of the applicant also appear to be protected by a declaration pursuant to section 63. For this reason, therefore, we have decided not to exercise our discretion under section 1(4).

14. We therefore declare:

- (1) that 414655 Ontario Limited carrying on business as “Tanner Industries” is a successor employer to Do-Tan Manufacturing Limited; and
- (2) that Tanner Industries is bound by the terms of the collective agreement between Do-Tan Manufacturing Limited and the applicant.

In the circumstances of this case, we fix the date or time of sale to have been December 15, 1983. We also point out that the collective agreement to which Tanner Industries is now bound contains a geographic limit on the bargaining rights held by the applicant and this decision should not be interpreted as effecting an amendment of that so as to include the current premises at Stoney Creek. Section 63 protects existing bargaining rights and nowhere in the statute are bargaining rights extended outside the geographic parameters of the certificate issued by the Board in a collective agreement agreed to by the parties (see *Mountain View Dairy Ltd.*, [1967] OLRB Rep. Feb. 911). Should Tanner Industries operate within the geographic boundaries of Dundas, Ontario, bargaining rights held by the applicant may apply to such operations. We voice no opinion on the liability, if any, that Tanner Industries bears in respect of Do-Tan’s actions under the collective agreement.

0957-84-M Carpenters' District Council of Toronto and Vicinity on behalf of Local 27 and 1304, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Ellis-Don**, Respondent

Arbitration — Construction Industry Grievance — Evidence — Practice and Procedure — Whether document introduced by union causing surprise — Whether Board reconvening hearing to permit reply evidence — Collective agreement prohibiting discrimination in hiring — Whether grievor not hired because of colour or race — Nature of burden of proof where discriminatory hiring alleged at arbitration

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members I. M. Stamp and L. C. Collins.

APPEARANCES: *David Watson, Frank Rimes, Ucal Powell for the applicant; D. Jane Forbes-Roberts, Janet Trim and Peter Vancook for the respondent.*

DECISION OF THE BOARD; October 15, 1984

1. The applicant and respondent are both bound by the terms of a provincial collective agreement between the Carpenters Employer Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, dated April 17, 1984, with effect from May 1, 1984, to April 30, 1986. On May 31, 1984, the applicant submitted a grievance which alleged that the respondent employer had failed to hire, re-hire or recall the grievor, Ucal Powell, over a period culminating on May 24, 1984, contrary to Article 5.04 of the aforesaid collective agreement, which reads as follows:

5.04 No person shall be refused employment or Union membership because of his or her sex, race, colour, creed, age, or national origin.

On July 9, 1984, the applicant referred that grievance to this Board for arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The hearing of this matter was scheduled for and proceeded on July 23, 1984. There was no challenge to the arbitrability of the grievance or to this Board's jurisdiction to deal with it. There was no suggestion that the respondent had inadequate notice of the particulars of the grievance, which would have been discussed informally between the parties prior to this matter coming on for hearing. The hearing of evidence in this matter was completed on July 23, 1984. At the close of the evidence, the parties agreed to waive the opportunity to make oral argument (which could not have been scheduled before November, 1984) and elected, instead, to file written argument. The Board has now received and considered both parties' written arguments and, in addition, their written submissions on a subsequent request by the respondent that the hearing be reopened to permit it to introduce additional evidence.

3. There was very little dispute about the factual background and context in which this grievance arose. The grievor, Ucal Powell, is a thirty-seven year old black who was born in Jamaica and started to learn his carpenter's trade there at the age of 15. He has fourteen years of experience in Canada in all areas of carpentry work. He is a qualified carpenter who was at all material times a member in good standing of the applicant.

4. The respondent, Ellis-Don, is a well known general contractor which engages in I.C.I. construction in Metropolitan Toronto and elsewhere in the Province of Ontario. At the times in question, it was involved in two projects about which we heard in evidence: the construction of an addition at the Toronto Western Hospital (“the hospital project”) and the construction of a fourth building at the Toronto Dominion Centre (“the TD 4 Project”), both in the City of Toronto. The grievor was looking for carpentry work in March, 1984, and applied to the Ellis-Don Superintendent at each of those two projects. The respondent hired him as a carpenter at the TD 4 project, and he did form work there from March 29, 1984, to April 24, 1984, when he was laid off. He immediately started looking for work again, and one of the sites at which he applied on more than one occasion was the hospital project. As we will note later, he spoke to the respondent’s superintendent at that project on more than one occasion; on each occasion he was told that the respondent was not hiring carpenters that day. One such day was May 24, 1984. By chance, the grievor discovered that a white carpenter was hired by the respondent’s superintendent within minutes after that superintendent had told the grievor he was not hiring carpenters that day.

5. At the beginning of our hearing there was some discussion about the order in which evidence would be presented, and the nature of the legal and evidentiary burdens which could be cast on each of the parties to this arbitration. In all the circumstances, including the recognition by both parties of the accuracy of the basic facts outlined in the preceding paragraph of this decision, the parties agreed that the employer would lead evidence first, and have the right to reply after the union put in its case. The parties agreed on one other matter, and that related to the hiring provisions of the Provincial Collective Agreement by which these parties are bound. The terms of that agreement limit the ability of employers to hire carpenters otherwise than through the applicant’s hiring hall. Both parties agreed, and asked us to accept, that the collective agreement would not have prevented the respondent from hiring the grievor in response to his on-site application. Equally, they agreed that nothing in the collective agreement compelled the hiring of the grievor. We note that Articles 5.05 through 5.07 deal with the right of an employer to “recall” a former employee within either six or three months of his last employment, depending on the length of that last employment. We observe that the parties’ agreement does not appear to involve a perverse interpretation of the provisions of the collective agreement.

6. The respondent’s first and only witness was Fred Corley, its Superintendent at the hospital project site. Mr. Corley recalled that the grievor had visited that site on three occasions that he could remember, and had spoken to him on two of those three occasions. On the day in question, May 24th, he had told the grievor there was no work for carpenters. Minutes later, another carpenter, John Uroic, had applied to him for work. Corley hired Uroic, and directed him to report for work the following day. The grievor, having seen this transaction, returned to Corley’s office and asked Corley why he had decided to hire Uroic after telling him that he did not need any carpenters. Corley said Powell was in a rage. Corley testified that he explained to Powell that he hired Uroic because he needed a man for work in the deep sump. The grievor then accused Corley of racial discrimination.

7. The explanation Corley gave us was that he only hired men if he knew them or had a recommendation about them from another Ellis-Don superintendent or foreman. He knew Uroic because Uroic had worked under him at the Erindale College project in 1971, some thirteen years earlier. He said that he had been looking for someone to work on the deep sump for about a week; if Uroic had not come along when he did, he would have assigned one of the carpenters in his existing crew to do that work. He said he did not hire the grievor because

the grievor had not previously worked for him, and did not have the recommendation of another Ellis-Don superintendent. He has a vague recollection that the grievor may have mentioned having worked for Ellis-Don. If that was mentioned, he says, then the grievor did not say when and where, and did not mention the TD 4 project. He acknowledges that he had taken on other workers from that project and, consistent with the practice he described, he acknowledged having spoken to the superintendent at that project about those employees before he took them on.

8. In cross-examination Corley acknowledged that he would go to the union hiring hall if he was unable to get a sufficient number of carpenters through transfers from other Ellis-Don sites and on-site hiring of carpenters he knew. Counsel for the applicant reviewed with Corley certain hiring hall records concerning the referral of carpenters to the hospital project in the period April 16 to June 15, 1984. It was put to him that he had contacted the hiring hall on May 24th and asked for *three* carpenters, one of whom was Mr. Uroic. Corley said he could not recall anyone other than Uroic. He was asked about one Tony Fantauzzi, whom the union's records show to be one of the three sent in response to Corley's request. Corley said that name did not ring a bell. He did recognize the name of the other of the three carpenters whom the hiring hall records show had been sent in response to a May 24th request by Mr. Corley. That man was Damio Mederios; Corley acknowledged there was a Dave Mederios working on the project who had started within a week either way of May 24th. Corley did recognize the names of several of the other carpenters whom hiring hall records showed had been referred to his site in the period mentioned earlier and, with respect to those carpenters whose names he recognized, he was able to identify previous projects on which they had worked under him or otherwise explain how they fit his hiring criteria. There were other names, however, which he was unable to identify as being former employees or referrals or transfers by other Ellis-Don superintendents, and there are examples of such referrals both before and after May 24th. In examination in chief, Corley denied that his failure to hire the grievor had anything to do with his being black. He said the man who served as carpentry steward and health and safety representative on his site was a black carpenter whom he had specifically asked to have transferred to his site from another site. He also said there were other black employees working on the project. In cross-examination he conceded that the two other black employees in question had been transferred to the site after this grievance was filed.

9. There was no allegation that Corley's decision not to hire the grievor had anything to do with his job skills. There was certainly no allegation that his work at the TD 4 project had been deficient in any way. Mr. Uroic was called as a witness by the applicant. He did confirm that Corley knew him from a project thirteen years earlier. In his examination he was asked to and did describe the work that Corley assigned to him; this was in response to a claim Corley made in cross-examination that the nature of the work in the deep sump required someone with special skills or expertise.

10. The grievor, Ucal Powell, testified next. We have noted earlier his prior experience, membership in the union and period of employment at the TD 4 project. The grievor testified that when he was laid off from that project on April 24th, it was because of shortage of work. The foreman had apologized for the short duration of his employment, and suggested that he go to the Toronto Western Hospital project to see "Fred", because Fred would be needing carpenters within a few days. Powell went immediately to the project and spoke to the foreman, Manuel Pinto. He told them he had just been laid off from the TD 4 project. Pinto told him that he would be needing carpenters soon and would give him a call. Parenthetically, we note it was Corley's testimony that Pinto could hire for this project only in consultation with him.

Powell did not receive a call from Pinto, and returned to the site the following Friday. He then spoke to Corley. He says he told Corley that he had recently been working at the TD 4 project. He emphasized this point in all his discussions with Corley and Pinto, because he realized that he was more likely to be hired if he had a track record with Ellis-Don. He told Corley the name of the Ellis-Don supervisor who had referred him to the hospital site. Corley told the grievor to see Manuel, the foreman. He went and saw the foreman, who said that he had the grievor's telephone number and would give him a call as soon as he was needed. The grievor did not receive a call, and continued to attend the site at least once a week. He spoke to Corley on each occasion, and would be told that he was not ready for carpenters, that there was not any work that day and that he would be called as soon as he was needed. He could see other carpenters on the site, and the number of carpenters he could see increased with each visit.

11. The grievor spoke with Corley twice on May 24th. In the first conversation, Corley said that he was not hiring and that Powell should see the foreman the following morning at 7:30 a.m. Powell thanked Corley, and started to leave the site. As he was leaving, a man approached him and asked where the superintendent was. That man, it transpires, was John Uroic. Powell directed him to the superintendent's trailer, then watched to see what happened. Having seen what he thought, correctly, was the hiring of Uroic, he returned to speak to Corley. He was stunned. He asked Corley why he had hired Uroic. According to the grievor, Corley's response was that he hired the man because he had been coming and speaking to him and to the foreman "over and over". The grievor then said, "isn't that what I have been doing?" When he got no response, he told Corley, "employing one black guy won't absolve you under the Human Rights Code." The grievor says that he remained calm, and that Corley got angry at that point. The grievor did not want to get into an argument with Corley, and left. He tried to contact the chief of personnel at Ellis-Don to complain about his treatment, but was not put through. This grievance was filed a few days later.

12. The last witness for the applicant was Karen Brace, the dispatcher in the applicant's hiring hall. She testified that she was the one who had completed the job referral slips and referral request records which had been put to Corley in cross-examination. She described the system of operation in the hiring hall, and established that the records in question would be accurate records of the date of each request or referral, the name of the person making the request or being referred and the particular project to which the referral related. Those records were then introduced as exhibits without objection by the respondent.

13. When the applicant closed its case, counsel for the respondent had the opportunity to lead reply evidence. It was apparent to all involved in the hearing that had counsel indicated a desire to introduce reply evidence, the hearing would have been adjourned to a date in November. Counsel for the respondent elected to call no reply evidence. Counsel for both parties then agreed to submit argument in writing. The deadline for submission of principal argument by both parties was set at August 31, 1984, several weeks after the hearing date, in order to accommodate the vacation plans of counsel for the respondent. September 10th was fixed as the deadline for submission by either party of any written reply to the principal argument of the other. The hearing concluded on those terms.

14. On August 30, 1984, counsel for the respondent wrote to the Board requesting that the Board's hearing be reconvened. The body of that letter reads as follows:

We are the Solicitors to Ellis-Don in the above-noted matter and appeared at the Hearing on July 23, 1984. At that Hearing, the Union put into

evidence certain documents indicating that individuals had been requested from the hiring hall on May 24, 1984 and dates following. This was a key element of the Union's case. Ellis-Don had had no prior knowledge or notification of this allegation, and had obviously no opportunity to check this allegation against their own records. Our Client has now had an opportunity to perform such a check. According to Ellis-Don's payroll records no carpenters, beyond Mr. Uroic, were hired at the relevant site between May 24, 1984 and June 11, 1984.

On July 23, 1984, it was left that the Parties would exchange written submissions on August 31, 1984. Obviously in light of the above-noted information we are requesting that the Hearing be reconvened and the Employer be given the opportunity to call reply evidence. We suggest that there is no prejudice to the Union as it will clearly have the opportunity to cross-examine all witnesses called by the Company and, in the event of an ultimate adverse ruling, the Grievor would not suffer in terms of remedy.

We reiterate that the Employer was caught completely by surprise by Exhibit 5, and respectfully request that the Board re-open this matter.

Counsel for the applicant was copied with this letter, and strongly opposed the application to reconvene and reopen the hearing. Counsel for the applicant filed its principal written argument on August 31st in accordance with the Board's direction. On September 11th, counsel for the respondent filed a principal argument which dealt with the merits but reiterated the request contained in the above quoted letter. No reply arguments have been filed.

15. We propose to deal first with the request to reconvene and reopen the hearing to permit the respondent to adduce the additional evidence referred to in its counsel's letter to the Board of August 30, 1984. The request is premised on the respondent's alleged surprise at the introduction by the union of evidence with respect to the respondent's requests for carpenters for the subject site in the period beginning May 24, 1984. We are bound to observe that the grievance served on the employer at the end of May made it clear that Mr. Powell was alleging discriminatory refusal to hire on May 24, 1984. While the respondent might not have known what evidence the applicant was in a position to tender in order to support this claim, one question which would occur to anyone facing such a charge is "who did we hire on and after that day, and why?". The investigation counsel says the respondent made after the hearing was one that might well have been made before the hearing. We are bound to observe also that the claim of surprise made in counsel's letter of August 30, 1984, was not made at the hearing of July 23rd. There was no suggestion at that time that the union's evidence had introduced an unexpected element which necessitated any further investigation on the part of the respondent. Not only was surprise not expressed, the respondent elected to call no reply evidence, and made that election after hearing the union evidence by which it now says it was caught by surprise. There is nothing in counsel's letter to explain why the investigation in question was only completed five weeks after the hearing concluded. There is no suggestion that this evidence could not with due diligence have been unearthed more quickly and, indeed, prior to the hearing. We observe also that the records introduced by the union are evidence of requests on behalf of the respondent for referral of carpenters during a period when the grievor was being told there was no work. Whether or not the respondent's payroll records would be determinative of the question whether anyone had been "hired" at that site in the time frame referred to in counsel's letter, they would tell us nothing about whether requests for referral

were made. This “new” evidence would not be unequivocally dispositive of the issues raised by the evidence the parties were prepared to introduce on the date fixed for hearing of this matter. In all the circumstances, we are not prepared at this stage to permit the respondent to resile from its decision to call no evidence. We turn, then, to the merits of the grievance.

16. Each of the parties addressed in argument the location and nature of the burden of proof in cases such as these, and each relied on the following passage from *Re Inglis Ltd.*, (1978) 17 L.A.C. (2d) 380 (Beck) at p. 382:

Discrimination is an extremely serious charge and the onus of proof lies upon the party making it. Is it sufficient merely for the union to set out what happened on the particular day and say that that conduct is *per se* discrimination without more? It is an accepted rule of evidence that where the facts lie peculiarly within the knowledge of one of the parties, very slight evidence may be sufficient to discharge the burden of proof resting on the opposite party. It seems to me that that rule is applicable in this case. In terms of proof reasonable inferences may be drawn from uncontested facts — inferences that call for an explanation. This is particularly so where one of the parties possesses particular knowledge with respect to essential facts — in this case the reason for the differential treatment. This is not to say that the burden of proof is shifted. It is rather to say that an onus of credible explanation is put on the party who alone may have knowledge of the actual reasons for the particular conduct in question: see *Retail, Wholesale & Department Store Union and National Automatic Vending Co. Ltd.* (1963), 63 C.L.L.C. 1161, para. 16,278 at p. 1164 (Ont. L.R.B.), where this point of evidence is discussed, albeit in a different context.

Although the discrimination in question in that case was discrimination on the basis of union affiliation, Professor Beck’s observations on the burden of proof and the onus of adducing evidence bear equal application to the issue in this case; (for a helpful review of subject of burden of proof in discrimination cases see *Base-Fort Patrol Ltd. v. Alberta Human Rights Commission*, 83 CLLC ¶17,010. (Alta.Q.B.)). To succeed, the grievor must establish, on the balance of probabilities, that he was not hired because of his race or colour. In assessing whether proof has been made out, it is useful to bear in mind the observations of Professor Borins, as he then was, in *Kennedy v. Mohawk College* (as quoted in *Suchit v. Sisters of St. Joseph*, 83 CLLC ¶17,009):

Discrimination on the grounds of race or colour are frequently practiced in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises. In my view, such conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course, places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature and purpose of such conduct. It should be added that the Board must view the conduct complained of in an objective

manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness.

17. The grievor's *prima facie* case rested on the observation that on May 24th Corley told him he was not hiring carpenters, and then hired a white carpenter, John Uroic, within a matter of minutes thereafter. As the only apparent difference between them was the colour of the grievor's skin, the failure to offer an explanation would have been fatal to the respondent's defence. The explanation offered is that Corley was not familiar with the grievor's work, but did know Uroic's work because they had worked together a number of years earlier. The respondent says the evidence establishes that Corley did not hire people whom neither he nor his carpentry foremen knew, unless they came on a recommendation from another Ellis-Don project superintendent. We accept that Corley considered a track record with Ellis-Don a prerequisite to site hiring of carpenters, but must note Corley's admission that he would call the union hiring hall for carpenters if he could not fill his needs with men transferred from other Ellis-Don sites and on-site applicants who met his hiring criteria. The evidence suggests that his need for carpenters had obliged him to do that on this project. We accept the evidence of the union's hiring hall dispatcher about the numbers of men requested for this project from time to time and the names of the men who were issued referral slips as a result of those requests. It is true, as counsel argued, that some of those men were requested by name. On the basis of what the parties advised us about the union's practices with respect to site or name hiring, in cases where men were requested by name, the request to and referral by the hiring hall may only have been procedural formalities resulting from an on-site hiring which fit Corley's criteria. Not all of the referrals fall within that category, however: Corley did not recognize several of the names of men who had been referred to the site in the period during which the grievor had been seeking work at the site as well as the period immediately following May 24th. That suggests that those men had not been requested by name or site-hired in accordance with Corley's criteria, in other words, it suggests that Corley or persons acting under his instructions requested carpenters without specifying them by name. The impression that Corley could not fill his needs with carpenters he knew is strengthened by Corley's evidence about the work in the deep sump. It is apparent to us that Uroic's only special qualification for that work was that Corley knew him. Corley testified that completion of that work had been important to the advancement of the project and that he had been in need of someone to do it for a week when Uroic arrived on the site. We can understand Corley's desire to have carpenters about whom he could be confident; it is apparent from the evidence that these were in short supply. That, in the final analysis, is what makes it difficult to accept Corley's account of his dealings with the grievor.

18. The grievor says that he told Corley on more than one occasion of his recent work for Ellis-Don at the TD 4 project, and referred to the superintendent at that project by name. Corley says there was no mention of the TD 4 project, and only a vague reference to past employment with Ellis-Don. Having seen and heard them both testify, we accept the grievor's evidence on this point. The grievor was a more credible witness generally, and was certainly more credible on this issue. It was in his interest to make the most of his recent employment with the very employer from whom he was seeking further employment, and we believe him when he says he did. We cannot accept counsel's explanation that if the TD 4 project was mentioned, Corley simply failed to hear it. If we are to accept anything Corley says, we must conclude he was on the lookout for carpenters who had worked for Ellis-Don before, particularly carpenters who, like the grievor, were just coming off other Ellis-Don projects. In those

circumstances, it is difficult to imagine that he would not hear the very thing he hoped to hear from job applicants, unless he hoped not to hear it from this applicant. Even if we accepted as true Corley's recollection of his meetings with the grievor, it seems odd, in the circumstances as we have described them, that he would not have followed up a vague mention of former work with Ellis-Don by asking "when", "where" and "with whom".

19. It is not without significance that what Corley told the grievor at the site was not what he told us. He told the grievor that he was not hiring that day. He told us that he was hiring, but would not hire the grievor because he did not fit the aforementioned criteria. We asked Corley why he did not give the grievor that reason, and he replied that he thought he would have had problems with the union. He was entirely unable to explain what kind of problems he could possibly have feared. Indeed, it was not long after giving that answer that Corley observed that he might have told the grievor that he would not hire him because he did not know his work. He said this was possible because he had given that explanation to other carpenters whose on-site job applications he had rejected. We are satisfied that he did not give that explanation to the grievor, and that his testimony in this area was an attempt to obfuscate the absence of a rational explanation for his response to the grievor's application for work. Corley's contemporaneous explanation to the grievor of his hiring of Uroic is also instructive. Even if his version of what he said is believed, it is apparent that he did not say that he knew Uroic's work. However, we believe the grievor's testimony that Corley told him he had hired Uroic because he had come several times looking for work. This was untrue; Uroic had not been on the site before. More importantly, it *was* true of the grievor, and had not led in his being hired. It is as though the grievor was, for Corley, both inaudible and invisible.

20. Counsel for the respondent submits that the presence on this site of one black carpenter is of "paramount importance" in this case. Counsel notes Corley's evidence that this man had been transferred to the site at his request, and argues that "it simply does not make sense to suggest that a racist would specifically request that a black employee be transferred to his project." While we agree that this evidence is relevant to the question before us, it is not determinative. We are concerned here with an allegation of racial discrimination, not racial antagonism. We are not called upon to decide whether Mr. Corley is a racist, nor whether he is consistently discriminatory. The question before us is whether Corley's failure to hire the grievor was motivated by the grievor's race or colour. While the matter is not free from doubt, the applicant is not required to establish its case beyond a shadow of a doubt. When we weigh all the evidence, we find it more probable than not that Corley's refusal to hire the grievor was discriminatory and violated Article 5.04 of the collective agreement between the applicant and the respondent.

21. We note there was not the slightest suggestion that the respondent company itself has any discriminatory hiring policy, or that it was aware of or condoned discriminatory practices by any of its superintendents. It is, however, legally responsible for the behaviour which we have found was in violation of the collective agreement.

22. The question of remedy was not addressed in evidence or argument; both parties wished to defer that issue until the issue of liability was determined, and requested that we remain seized of that issue in the event the grievance was upheld. Accordingly, we will defer determination of the nature and extent of the appropriate remedy, and remain seized of that issue while the parties attempt to resolve it by agreement.

2310-83-U John Glykis, Complainant, v. Hotel Employees Restaurant Employees Union, Local 75 and **The Four Seasons Hotels Limited** (Inn on the Park), Respondents

Duty of Fair Representation — Unfair Labour Practice — Decision not to arbitrate discharge made at executive and union membership meetings — Usual practice to permit grievor to address meetings — Grievor not given adequate notice of either meeting — Gross negligence constituting arbitrariness

BEFORE: Corinne F. Murray, Vice-Chairman.

APPEARANCES: *Nicholas P. Kapilos and John Glykis for the complainant; Alick Ryder, Q.C. and Liana Turrin for the respondent union; Dolores Zimak for the respondent hotel.*

DECISION OF THE BOARD; October 31, 1984

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2. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent breached section 68 in its handling of Mr. Glykis' termination from his employment with the respondent hotel (hereinafter "the hotel") as a doorman. There is no dispute that the respondent union (hereinafter "the union") owed the complainant a duty under section 68 because he was a member of a bargaining unit for which the union holds bargaining rights. The sole question is whether the union failed to fulfill section 68 which provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. Mr. Glykis was employed by the hotel as a doorman between 1979 and the date of his termination. He had previously worked for the hotel in or around 1973. Between 1973 and his return to the hotel he worked in doorman/bellman functions for the Sheraton Centre Hotel and the Holiday Inn. He also held other jobs unrelated to the hotel industry. At all of these hotels he was in a bargaining unit for which the union held representation rights. These facts are only important because they reveal that Mr. Glykis had, previous to his employment with the hotel in 1979, relied on the union as his bargaining agent to handle three grievances arising at other work locations. All three grievances were handled to the complainant's satisfaction, either by arbitration or settlement. Since 1979 the complainant has lodged a number of grievances, one of which proceeded to arbitration in which the complainant was unsuccessful in maintaining that he could eat his meals in a certain location. The other grievances were resolved short of arbitration; in some instances the complainant's position, in whole or in part, was upheld and in others not. There is no pattern of frivolous grieving by the complainant but it is also true that the complainant was not reluctant to assert his point of view as to his working conditions.

4. While in section 68 complaints the merits of the grievance are not in and of themselves determinable by the Board, it is nevertheless relevant to an assessment of whether the union fairly put its mind to the complainant's grievance over his termination to consider what events led up to the termination and what the grievor advised the union about them. There is no dispute that Mr. Glykis' functions at the hotel were to "look after" the entrance to the hotel, assist guests with their suitcases into the lobby, park their cars and give directions or information helpful to the guests. Needless to say, he was expected to be pleasant and helpful in attitude. It was clear that an important part of his function was to keep the entrance way of the hotel clear of cars because it was a fire route. He received a memo in October of 1982 from management critical of how quickly he was getting the cars of guests moved out of the entrance way. While this memo was ultimately taken off his file through the union's intervention, it shows that the hotel had put a high importance on this aspect of Mr. Glykis' job. Mr. Glykis did not work alone. Generally, there were two employees taking care of guests and cars.

5. On the evening of Friday, October 14, 1983, the time when an incident occurred which apparently led to his termination, he was working with another doorman, Dominic DeCarlo. Mr. DeCarlo went to assist the guest who had drawn up to the hotel's entrance in a car. After Mr. DeCarlo helped the guest with suitcases, etc., he advised him that the guest's car had to be moved out of the entrance way. He also advised the guest that the keys could be left with him for him to do it if the guest wished. Mr. Glykis believed that Mr. DeCarlo was pleasant to the guest but the guest began to raise his voice and "gave him a hard time". Mr. Glykis intervened when he heard the guest refuse to leave the keys. Mr. Glykis claims he politely advised the guest he was required to leave the keys because this was the rule. Mr. Glykis said the guest told him to leave him alone and warned he could get him fired if he did not, because he knew the manager and had been coming to the hotel frequently. The guest then went into the hotel, without leaving his keys, came out shortly thereafter and drove away very fast. When Mr. Glykis saw the guest again in the lobby, he does not remember exactly what he said but again advised him that the rule was that the guests had to leave their keys with the doorman. Mr. Glykis indicated that he was polite at all times, and never swore at him. When he encountered the guest in the lobby, Mr. Glykis said the guest had "cooled down" and commented that the other doorman gave him a hard time. Mr. Glykis claims he never saw the guest's car again that night. On Wednesday, October 19th, Mr. Glykis was called by Mr. Pergant, Manager of the hotel, to his office where Mr. Pergant and Mr. Racine, Rooms Manager of the hotel, were waiting for him. Mr. Glykis' evidence on what happened at this meeting was not contradicted by Mr. Pergant's testimony. Mr. Glykis recalled Mr. Pergant claiming that he had just received a letter from a guest about an incident on Friday, October 14th. The letter-writer claimed he had been ordered around by the doorman and because of this manner of handling him as a guest, he decided to check out early and go to the Holiday Inn. Mr. Glykis testified that Mr. Pergant told him that he should be terminated because this was a complaint from a guest who had been coming to the hotel for 10 years and because there were a number of "things" on Mr. Glykis' file already. Mr. Glykis said he told Mr. Pergant he disagreed that he should be fired and asked for written reasons for his termination. Mr. Pergant refused. Mr. Glykis was given his pay and he was escorted out of the hotel's premises by security guards who were waiting outside Mr. Pergant's office.

6. Mr. Glykis phoned the union's offices immediately and was advised by Cledwin Longe, a steward, to come to its offices next day. Mr. Glykis testified that next day he met with Mr. Longe, "told him what had happened" and Mr. Longe expressed the opinion that it was not fair. He immediately prepared a grievance to this effect. Mr. Glykis was given the grievance to deliver to the hotel. Mr. Glykis did this. Mr. Longe testified that Mr. Glykis told

him he did not know why he had been fired but thought it was because “they didn’t like him”. Mr. Longe was skeptical about Mr. Glykis not knowing the reason, but Mr. Glykis maintained this was the truth.

7. Subsequently Mr. Glykis was advised by the union about a meeting at the hotel in connection with the grievance. He attended the meeting (which all involved agree was on October 28th) at which Mr. Pergant, Ms. Zimak (the hotel’s Personnel Manager), Mr. Longe, Fred George (the hotel’s steward) and Frank Cabrita (chief steward and bellman at the hotel) were present. It is clear that Mr. Longe went into this October 28th meeting with only the information he had received from Mr. Glykis, i.e., he did not know why he was fired. Mr. Glykis testified that Mr. Pergant said “the same kind of things as he had said when he fired him”. Mr. Pergant elaborated on what was said in his testimony. Mr. Pergant claimed he assessed Mr. Glykis’ record and concluded it disclosed that a great number of problems had arisen in the past relating to rudeness. The frequency of misconduct and memos to Mr. Glykis regarding house rules were so extensive that they could not be ignored when a report from a guest is received about an altercation between Mr. Glykis and a guest. Mr. Glykis recalled that Mr. Longe asked management to think again about firing Mr. Glykis because it was not right. Mr. Longe’s recollections are basically coincidental with Mr. Pergant’s evidence and with Mr. Glykis’ more limited recall. Mr. Longe indicated that when he turned to Mr. Glykis, after management had spoken, to ask whether he wanted to say anything, Mr. Glykis said that “they” were discriminating against him and did not like him and “wanted to get rid of him”, or words to this effect. Mr. Glykis did not contradict or deny he said this. The only thing that Mr. Glykis appears to have categorically denied to management in this meeting was about allegations regarding damage to the guest’s car. Mr. Glykis’ memory of the meeting is very vague in comparison with Mr. Pergant’s and Mr. Longe’s and I have concluded that the end result of the meeting was that Mr. Glykis had not, during the meeting, substantially denied most of what was said about the incident and his record. Mr. Glykis seems to have initially indicated a lack of knowledge about why he was terminated (he explained it was because it was not written down) and during the meeting continued to avoid coming to grips with the issues raised by management; instead, he defended himself on the basis that no one liked him.

8. After the meeting, Mr. Longe claims he made an investigation about the grievor and the incident, not only with his department but in other departments of the hotel. He could not recall who he specifically spoke with — he could not recall speaking with Mr. DeCarlo. He found nothing to support any different view of Mr. Glykis’ conduct over a period of years from management’s charges that he was verbally abusive and had a poor attitude toward guests, and he could find no witnesses supportive of Mr. Glykis. When Mr. Longe reported the results of his investigation, Mr. Glykis once again claimed that no one liked him.

9. He advised George Pineo, the Business Agent of the union, that in his opinion there was no merit to the grievance by Mr. Glykis because there had been an incident of abusiveness and he had received a number of previous verbal and written warnings in connection with the same type of action as he was accused of engaging in with the guest. The hotel decided to stick with its decision to terminate and so advised Mr. Longe by letter dated October 31, 1983. An Executive Board meeting was held November 3rd and the Executive decided not to proceed to arbitration. This was upheld at a membership meeting at the hotel on November 8th.

10. George Pineo, the union’s Business Agent for some 17 years and chief architect of Local 75’s process of handling grievances, testified about the union’s practices and, in particular, about the handling of Mr. Glykis’ grievance regarding his termination. Since the handling of

Mr. Glykis' grievance up to and including the October 28th meeting is not complained of and does not diverge from the practices of Local 75, I will not dilate on that aspect. Mr. Pineo testified that after the third step meeting with management (which the October 28th meeting was), any of three officers of the Local can decide to put the grievance on for arbitration immediately. If this is not done, then the Local writes to the employer requesting an extension of the time limits to consider. The grievance is then considered first by the Executive Board and then by the membership at regularly scheduled membership meetings (every two months). At the November 3rd Executive Board meeting, Mr. Pineo reviewed Mr. Glykis' history of grievances and the incident in question. While Mr. Pineo did not say this precisely, it is clear that he considered the allegations of rudeness in connection with the guest a culminating event in a long history of altercations by Mr. Glykis with guests, management and co-workers at his workplace. There was nothing in what Mr. Pineo advised the Executive Board about Mr. Glykis' record that was ever established by the complainant to be untrue. Indeed, it was similar to a conclusion of fact made by an arbitration board almost 2 years before:

The grievor's record includes 2 oral warnings and 2 written warnings each of which involves either discourteous or rude behavior to guests and fellow employees.

The arbitration board itself upheld a 3-day suspension for the same type of conduct in connection with staff at the hotel over where Mr. Glykis ought to have his meal during his shift. After Mr. Pineo's review, which contained no recommendation one way or the other, a lengthy discussion ensued (one of the lengthiest Mr. Pineo had witnessed). Compton Marshall, Vice-President of Local 75, then made a motion that arbitration not be taken on the grievance of Mr. Glykis. The President, Jean Guy Belanger, put the motion and the Executive Board decided not to take the grievance to arbitration.

11. Mr. Marshall testified about this meeting and about a telephone conversation he had with a Mr. Carlisi, a lawyer who phoned him to inquire into how the Local decided not to go to arbitration. Mr. Marshall could recall that the Executive Board members had decided that Mr. Glykis' grievance was not a good case "from the evidence presented" but could not recall what that evidence was in detail. He recalled Mr. Glykis' "record" being discussed and one of the reasons the Executive chose not to support Mr. Glykis' arbitration was because the union generally goes to arbitration regarding a discharge to get a person their job back. Mr. Glykis had succeeded at a previous arbitration in getting his job back at another hotel, but instead took a monetary settlement. When a lawyer acting for Mr. Glykis, Mr. Carlisi, phoned Mr. Marshall sometime in December to inquire about the Executive Board's decision, Mr. Marshall recalls advising him that the Executive Board had decided that Mr. Glykis did not have a very good case and the money should not be spent on it. He mentioned that the Executive Board was not "keen" because the Local had got Mr. Glykis' job back before through arbitration and Mr. Glykis took a money settlement. Mr. Marshall did not deny that he could have told Mr. Carlisi it was a "political" decision in response to Mr. Carlisi questioning whether it was so.

12. Mr. Carlisi testified, relying on simultaneously written notes, about his telephone conversation with Mr. Marshall on December 7, 1983. He claimed that Mr. Marshall told him that Mr. Glykis had a bad record. While the Business Representative wanted to go to arbitration, his co-workers did not want to support him. Also, the Executive Board was not pleased with Mr. Glykis for taking a money settlement instead of his job which the Local had succeeded in getting through arbitration. Mr. Marshall detailed the incident itself, i.e., an argument

between Glykis and a guest about the location of his car and the customer wanting to leave the car in a forbidden area because of expensive equipment. Mr. Glykis threatened him and next day the car was damaged. Mr. Carlisi questioned the proof of the damage to the car and Mr. Marshall claimed that no evidence was produced linking it to Mr. Glykis. Mr. Carlisi expressed his opinion that he thought the process was pretty "political" and the Executive seemed afraid of the membership. Mr. Marshall agreed.

13. The next step was consideration of the recommendation of the Executive Board by the members at a regular general membership meeting held at the hotel's location on November 8, 1983. These meetings are held every 2 months. The Minutes show that President Belanger and another member recommended that Mr. Glykis' grievance not proceed to arbitration. Neither testified as to what they did, if anything, beyond this. Mr. Marshall was not present for this segment of the meeting but Mr. Pineo was, because he reviewed Mr. Glykis' file for the membership. He did not say what it was he said in detail but he could recall the President filling in what he missed. Mr. Pineo did recall saying to the members that the grievance did not have much merit, and he made them aware of the previous arbitration where Mr. Glykis did not take his job back. A heated discussion ensued and it was clear that the members did not want to expend any funds to take his case to arbitration. The decision of the membership was to support the Executive's recommendation.

14. By letter dated November 10, 1983, Mr. Pineo advised Mr. Glykis that neither the Executive nor the membership supported taking his grievance to arbitration. Mr. Glykis said he did not receive the letter. He was informed by Mr. Longe by telephone about the outcome. Mr. Pineo says that most members who receive this type of letter come to him saying they do not like the decision and request an opportunity to appeal before the Executive Board and membership to overturn the decision. Mr. Glykis said he had no notice in advance of either the Executive Board meeting or of the membership meeting. He did not know he had a right to appear before either, because neither Mr. Longe nor anybody else advised him he could. Mr. Longe testified that when he reached Mr. Glykis after the hotel made the decision to reject his grievance, he explained to Mr. Glykis that he could write to request permission to attend the next meeting of the Executive Board to explain his situation and that he also had a right to speak to the general membership as well. He did not tell him of the specific dates for these events, even though they must have been set at the time Mr. Longe spoke with Mr. Glykis. Mr. Glykis did not ask either. Mr. Longe assumed he would know where to write to seek the permission because he had given him his card which had the proper address. No one asked Mr. Longe how Mr. Glykis could get a letter into the Local in time for the Executive Board meeting within less than 3 days at the most, or one day at the least. Mr. Longe indicated he had difficulty reaching Mr. Glykis to report to him the decision of management not to uphold the grievance. The earliest he could have received this information was on the Monday (October 31st) following the Friday grievance meeting. In all probability, he did not receive it until November 2, 1983, because Exhibit "18", Ms. Zimak's letter to this effect, is date-stamped November 2, 1983. Assuming that Mr. Longe may have known by oral advice on Monday, October 31st, and assuming he would have taken at least a day to reach Mr. Glykis (he claimed he had difficulty), then Mr. Longe would have been advising Mr. Glykis to write and seek permission to attend an Executive Board meeting to be held 2 days later. It is odd and it is unimaginable that he would not have told Mr. Glykis about the meeting and tried to arrange a speedy delivery of the written request. He certainly also could have explained when the membership was to meet to consider it so that Mr. Glykis could at least attend. By his own evidence, Mr. Longe did neither.

15. On the basis of all the evidence, I have concluded that there was a failure to fulfill section 68 of the Act in that Mr. Glykis was not informed in a proper manner as to the time of two crucial meetings by the union to consider his case, which meetings he was entitled to attend. I cannot find that he bore any onus to inquire into when the Executive was to meet or when the membership was to meet in the circumstances. The processing of his case through these stages was incredibly fast; and he was informed of management's decision so close to these two meetings that no reasonable person could have been expected to take action *in writing* immediately to get his opportunity to put his case to each body. Because the timing was so important, Mr. Longe had a duty to inform him. I do not think Mr. Pineo's evidence about there being *subsequent* opportunities to try to change the minds of the Executive and membership after the decisions are made is equal to the opportunity to bring it to the Executive or membership in the first instance, and I do not consider that Mr. Glykis accepted the faulty procedure or waived his rights by not reacting to Mr. Pineo's letter, especially because he says he did not receive it. Even if he had, his non-action would have been understandable. In any event, he brought these proceedings so he certainly could not be considered to have failed to fulfill his obligation to actively pursue his case.

16. The recollections of all the material witnesses, Mr. Glykis and Messrs. Pineo, Longe and Marshall, are cloudy on many important aspects and details of conversations, investigations and actions. It appears from the evidence of the union that Mr. Glykis may not have been wrong in his assertions made many times to Mr. Longe that everyone at the hotel did not like him. Unfortunately for Mr. Glykis, there were concrete, indisputable instances where he was rude and abusive with staff and management, and this was the very conduct he was accused of in connection with the guest on October 14, 1983. This type of grievance required the Business Manager, the Business Representative and the membership to take into account the grievor's character and patterns of conduct to assess the likelihood of succeeding at arbitration. Be that as it may, it is still clear and undisputed that Mr. Glykis, in accordance with the Local's normal practice, was entitled to be present at the Executive and membership meetings to plead his case. Perhaps if he had attended, he could have explained his conduct or dispelled these assessments about his penchant for getting into altercations. He clearly missed an opportunity which he should have had and could have had according to internal union procedures if he had been given clear times and places of these meetings. If the timing of the meetings had been different, then it would be understandable that Mr. Longe would not advise on them specifically. However, common courtesy would have dictated that Mr. Glykis be advised of the rapidly approaching consideration of his grievance. This conduct amounted to gross negligence and I have found on this basis that this is arbitrary treatment and a violation of section 68.

17. The remedy in this instance is the extension of an opportunity to Mr. Glykis to attend before both the Executive and membership meetings and present his case, with or without the assistance of his counsel. Should the membership decide to support his arbitration, we order that the time limits of the collective agreement not be used as a defence by the hotel.

0643-84-R Canadian Air Line Employees Association, Applicant, v. Emery Air Freight Corporation, carrying on business under the name of **Emery Worldwide**, Respondent, v. Group of Employees, Objectors

Constitutional Law — Respondent Canadian arm of worldwide cargo transportation system — Bulk of deliveries to and from locations beyond Ontario — US airline and trucking company carrying out out-of-Ontario carriage under contract — Respondent not involved in physical aspects of out-of-province carriage — Not “federal undertaking” — Not integral to US airline or trucking company — Not distinguishable from freight forwarding cases

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *J. James Nyman, J. T. Saunders, P. Pelletier and J. Armstrong for the applicant; C. E. Humphrey, Louisa Davie and Gary Kennedy for the respondent; no one for the objectors.*

DECISION OF THE BOARD; October 3, 1984

1. This is an application for certification in connection with a group of office, sales and clerical employees of the respondent.

2. On the basis of the evidence heard, the Board finds the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. In this application the respondent has raised the preliminary question of the jurisdictional competence of this Board to entertain the instant application. The respondent asserts that the application ought to be brought under the provisions of the *Canada Labour Code* because:

- (a) the respondent is an undertaking extending beyond the limits of Ontario, and in the alternative,
- (b) the respondent is an integral part of an undertaking or undertakings which extend beyond the limits of Ontario.

4. The respondent is the Canadian part of a worldwide transportation system. The transshipment of goods by the respondent, is divisible into two different components, i.e., national (within Canada) and international (both into Canada from outside Canada and from within Canada to outside Canada). Within Ontario the respondent has two bases for operating (known as “stations”) — Ottawa and Malton. The Malton operations are the subject of this application for certification. In the rest of Canada the respondent has 6 stations — Halifax, Montreal, Winnipeg, Calgary, Edmonton and Vancouver. Goods coming to and going out of Canada to the United States and other worldwide location pass physically through facilities in Dayton, Ohio, known as the “Superhub”, whereas the goods originating from within Canada and being delivered to parts in Canada do not. A computer, located in Wilton, Connecticut, receives, stores and communicates information pertinent to the international transshipment of goods by the respondent on behalf of its customers.

5. In connection with the Malton station the respondent leases a portion of the cargo area, known as Cargo Building "B", at the Lester B. Pearson International Airport. The major part of this leased area is a bonded warehouse where goods being received and forwarded are stored. The other part of the leased premises is an office area, which houses a computer terminal linking the Malton operations to the Wilton computer. Through that terminal the respondent's Malton employees can input data regarding items received by the Malton facilities which are to be transshipped and can "track" the progress of the goods through the Emery Worldwide system. The terminal also allows Malton employees to advise the receiving stations of the approximate arrival time of the goods sent from Malton and the delivery instructions of the customer. In connection with items whose destination is the Malton station, the terminal outputs information as to value, originating point, delivery instructions, etc., which allows the Malton employees to "track" those items for its customers.

6. Based on the total number of shipments Malton handles, only 10% of them are deliveries in Canada between Malton and other Canadian stations. The bulk (75%) of Malton's shipments are to and from the United States with 15% going to and from off-shore locations. For the purposes of the respondent's argument the important federal aspect is the movement of items to and from the U.S. and therefore the information as to those going to or coming from "off-shore locations" is not precise. For the purpose of clarity we will first describe the respondent's intra-Canada operations and then describe the intra-North America operations.

7. For items originating in the area served by the Malton station (the western limits of Mississauga to the eastern limits of Scarborough) for a destination point inside of Canada, the following process occurs. A customer contacts the respondent's Customer Service Department and requests a "pickup". A pickup slip is made up by an employee in this department from information supplied by the customer, i.e., customer's name, address, number of pieces in pickup, weight, destination, whether hazardous or requiring special treatment. The completed pickup slip goes to a dispatcher located at the Malton premises and the dispatcher directs, via a two-way radio, the appropriate driver to pick the item up. The trucks used for the pickup are owned and operated by a separate corporate entity, Corridor Transport, which has no legal connection with the respondent except by contract. The trucks are painted with the respondent's logo and these trucks are used exclusively in connection with the respondent's business. The drivers wear Emery uniforms. When the driver makes the pickup, the customer signs a receipt (usually an airbill) which either has already been made up by the customer or which the driver has made up. After the pickup has been completed and the driver takes the item to the Malton facility, it is off-loaded. The respondent uses commercial carriers, for example, either Air Canada or companies in the business of overland transportation, or a combination thereof to convey the goods from Malton to their Canadian destination. The purchase of space on Air Canada flights is on an "as necessary" basis. We received no evidence that any other commercial carrier was used besides Air Canada.

8. Delivery of items received at Malton from other Canadian stations or from the U.S. to destinations within the area served by the Malton station are made by the Corridor Transport drivers in trucks printed with the respondent's logo. If delivery is for a location beyond this area, the respondent's employees make arrangements to retain another commercial carrier.

9. For items going to and from the U.S. the same pickup and delivery procedures at Malton apply as sketched out above. However, after the items are off-loaded to the warehouse and the inputting of information is done into the computer, the additional paperwork necessary for the movement of goods to the U.S. must be completed and checked, i.e., after a manifest

of freight already on the planned flight to the U.S. is received, a Canada Customs Advice Notice (Exhibit "2") is produced on Malton's terminal and "hard copy" printer, both of which rely on the programming of the Wilton computer. After clearing Canada Customs, the goods are then loaded onto the appropriate aircraft. At the time of our hearing the respondent had entered into a contract with Air Niagara, a separate corporate entity, under which Air Niagara provided a prop-plane painted with Emery's logo and a pilot for two flights per night between Toronto and Buffalo, 5 nights a week. There is no dispute that the plane is for the respondent's exclusive use and flies at a time dictated by the respondent. After the second flight each night, the plane and pilot remains in Buffalo overnight to await the cargo inbound for Canadian destinations. This cargo arrives in the early morning on a DC-8 owned by the respondent's U.S. corporate relative flying from the Superhub in Dayton to Buffalo. Items which have arrived on the Air Niagara flights are off-loaded to the Buffalo Air terminal, are cleared through U.S. Customs and then loaded on the DC-8 for the return to the Dayton Superhub. The cargo from the DC-8 is loaded either on the Air Niagara prop-plane or on a truck owned and driven by a driver employed by BuffAir, a separate corporate entity from the respondent, which supplies the truck for the exclusive use of the respondent (although in this instance, the Emery logo is not on the truck). The lighter items (envelopes) are carried by air and the middle and heavy-weight items are carried by BuffAir. When the Air Niagara flight from Buffalo or the BuffAir truck arrives at Malton, their cargo is checked by the respondent's employees and Customs documents are compared with invoices attached to the items. After this, the goods are ready for clearance by a Customs broker for the importer. After Canada Customs clears the broker's paperwork, the Customs Advice Notice is stamped and the goods requiring delivery are delivered either by Corridor Transport vehicles or by another commercial surface carrier as described above.

10. Gary Kennedy, the respondent's Director of Canada, testified as to the foregoing. He also testified as to the nature of the contractual arrangements between the respondent and Air Niagara and BuffAir. He testified in examination-in-chief to the effect that the respondent had virtually a "day-to-day" contract with Air Niagara. Under cross-examination he acknowledged that there were no ties between the respondent and Air Niagara except by way of the service contract relating to the prop-plane and pilot as outlined above. He agreed that Air Niagara holds the necessary licences to operate the aircraft dedicated to Emery's use. The respondent is not Air Niagara's only customer. The respondent has no control over the hiring, firing or any other terms or conditions of employment of persons necessary to the Air Niagara flights. Mr. Kennedy also agreed that the only link between BuffAir and the respondent was by way of contract, although not describing it as a "day-to-day" one like Air Niagara's. BuffAir holds the licence necessary to make the runs for the respondent, although, as far as Customs clearance is concerned, the trucks are able to cross the U.S./Canada border without clearance at that point because of a special permission granted to the respondent by Canada Customs for the clearance to occur at Malton instead of at the border crossing. The driver of the truck is employed by BuffAir and all the terms and conditions of employment are under BuffAir's control. If a problem arises with either Air Niagara or BuffAir employees working on the respondent's contracts, the respondent complains to Air Niagara or BuffAir and they remedy the situation. While Mr. Kennedy could not be certain that BuffAir had other customers besides the respondent, he thought it probable. Mr. Kennedy agreed with the general statement that insofar as the transshipment of goods between Malton and the time a DC-8 operated out of the Dayton Superhub becomes involved, the entire operation of transshipping goods is done under contract by other entities, with no corporate relationship to the respondent. We note also that Mr. Kennedy agreed that all the other Canadian stations are operated on this same basis, i.e., carriage of goods between the Canadian station to the appropriate U.S. entry point is done under contract by other entities, with no corporate connection to the respondent.

SUMMARY OF ARGUMENTS

11. Counsel for the respondent primarily argues that the respondent is “an undertaking extending beyond the limits of the province” within the meaning of section 92(10)(a) of the *Constitution Act, 1867* (formerly named the *British North America Act, 1867*, 30-31 Vict., c.3 (U.K.)) because the Canadian/U.S. flow of goods, is an “international distribution network” made up of a number of components assembled by the respondent in such a fashion as to qualify as “an undertaking extending beyond the limits of the province”. Counsel for the respondent emphasized the overall control of the system by the respondent and relied on this aspect of the facts to argue that the respondent’s operations are distinguishable from the “freight forwarding” fact situations which were the basis of numerous decisions of this Board and the Courts (for example, *Airgo Agency Limited*, [1982] OLRB Rep. Sept. 1233; *Ottor Freightways Limited*, [1975] OLRB Rep. Jan. 1; *Re The Queen and Cottrell Forwarding Co. Ltd.* (1981), 33 O.R. (2d) 486 (Div. Ct.); *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* (1976), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, 11 N.R. 606 (F.C.A.)). Counsel pointed out that the evidence of Mr. Kennedy showed that Air Niagara and BuffAir were dependent on the respondent and “if it didn’t put freight on either, then they would not operate”. BuffAir can only make the run from Buffalo to Toronto on behalf of the respondent and is allowed to postpone clearing Customs until reaching Pearson International Airport only because of exemption given to the respondent by Canada Customs. If the respondent had no freight, then Air Niagara would cease flying the prop-plane back and forth to Buffalo. Finally, the respondent’s counsel asked us to take note of the fact that the Toronto to Buffalo flight connects the freight with a system in the U.S. This linkage gives the respondent “meaning as a federal undertaking”, i.e., extending beyond the province. The “Emery system” cannot be divided up into parts because the parts do not have a separate existence. The respondent conceded that the part of its system for transshipment of goods within Canada, which relies on commercial carriers not under the respondent’s control, is indistinguishable from the factual situation described in the *Airgo* decision, *supra*, and therefore could not be considered a federal undertaking on its own. It is the international aspect, specifically to and from the United States, which makes the respondent a federal undertaking.

12. In the alternative, the respondent’s counsel argues that the respondent is an integral part of an undertaking extending beyond the province. The facts show that the respondent is “sufficiently interconnected with” Air Niagara and BuffAir to make the respondent’s labour relations subject to federal regulation. Counsel asserted that the evidence showed that the “business” of Air Niagara and BuffAir would not exist without “integration” with the respondent. He distinguished the railway and air carrier cases on the basis that those cases were rooted in the notion that without the particular freight forwarder’s business, the commercial carriers would still be moving freight for someone else. On the facts before us counsel believed it was clear that Air Niagara would not be moving freight back and forth across the border if the respondent was not its customer.

13. Counsel for the applicant saw nothing in the facts which made the respondent operation distinguishable, in the constitutional sense, from the freight forwarding companies examined in the cases cited in paragraph 11 above. While acknowledging that the respondent has greater “economic” or “marketplace” control over Air Niagara and BuffAir than the freight forwarders described in any preceding decision, this economic difference does not make it a federal undertaking extending beyond the province nor does it make the respondent an integral part of these two federal undertakings. Counsel for the applicant argued that the recognized and correct test is a “functional” one. The approach required to be adopted in

analyzing the respondent's arguments is most clearly annunciated by the Supreme Court of Canada in *Montcalm Construction Inc. v. Minimum Wage Commission, et al* (1979), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754 wherein the Court stated that, as a rule, there is exclusive provincial competence over the matters of labour relations and the terms and conditions of employment of persons in Canada and that these matters only come within federal competence if it is shown, functionally, to be an integral part of a subject over which there is primary federal competency. Counsel for the applicant argues that what the respondent's first position amounts to is an assertion that the respondent's system is an undertaking over which Parliament has primary competence. The error in it is the assumption that a high degree of control over the international movement of goods as a result of contractual arrangements creates an area of federal competence. While the respondent relied on the *Cottrell* decision *supra*, to support this assumption, a closer reading of it shows that when the Divisional Court referred to "direct control" over a carriage or communications system being necessary to have federal competence, it meant control in the corporate sense, not the control one obtains by contract. The applicant asserts that the respondent's system is essentially the same as that of *Cottrell*, which the Court found not to be a federal undertaking.

14. The applicant assails the respondent's secondary argument on the basis that it does not satisfy the tests laid down in the *Stevedores, case, sub. nom. Reference Re Validity of Industrial Relations and Disputes Investigation Act (Can.) and Applicability in Respect to Certain Employees of Eastern Canada Stevedoring Co.* (1955) S.C.R. 529, (1955) 3 D.L.R. 721 (S.C.C.), which established that in order for the labour relations area of a company's operations to be federally regulated it must be established that the company's operations consist exclusively of services integral or necessary to a federal undertaking. The applicant cites *Canada Labour Relations Board, et al v. Paul L'Anglais Inc., et al* (1983) 147 D.L.R. (3d) 202 (S.C.C.) which applied this test to companies selling air-time and producing commercial and audio-visual material for a broadcasting undertaking. The Court found these services not to be integral, in a functional sense, to the federal undertaking such that the labour relations matters of the service company would be removed from provincial competency. To the same effect the applicant's counsel cited *The Canadian Air Line Employees' Association and Wardair Canada (1975) Ltd., et al* case (1980), 97 D.L.R. (3d) 38 (Fed. C.A.) wherein a company (Intervac) to which Wardair, an acknowledged federal undertaking, "wholesaled" its passenger space and which in turn retailed this to the public, was found not to be integral to Wardair notwithstanding evidence to the effect that 90% of Wardair's ticket sales occurred through Intervac and, without Intervac, Wardair would stop operating. These cases show that the proof of economic power and control is not enough.

15. In response the respondent agreed that the test was a functional one and that the "core activity" of the respondent must be found to be the transportation of goods beyond a provincial boundary. While acknowledging and agreeing with the applicant that no one is directly employed by the respondent to actually move goods across boundaries, nevertheless the respondent is unlike the other freight forwarding cases because it has assembled a "system" which the Board cannot sever into parts for the purpose of its assessment of its jurisdiction. The distinction between Emery's system and the freight forwarding company's arrangements considered in previous decisions is not simply *who* was contracted with (e.g., Air Niagara as opposed to Air Canada) but the extent of the control the respondent is able to have regarding the timing and frequency of the international delivery flights and trips. The respondent submits the major difference is that the respondent has established a total system which does not operate without the respondent.

16. Section 92(10)(a) of the *Constitution Act, 1867* provides:

10. Local Works and Undertakings other than such as are of the following Classes:

- (a) Lines of Steam or other Ships, Railways, Canals, telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

Section 91(29) of the same Act provides that the subject matters excluded under section 92(10) are within the jurisdiction of the Parliament of Canada. It has been established for almost 60 years that as a general and primary rule, Parliament has no authority over labour relations as such or over the terms of a contract of employment: *Montcalm Construction Inc.*, *supra*, at p. 652, and *Northern Telecom Ltd. v. Communications Workers of Canada et al* (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107 (S.C.C.), wherein *Toronto Electric Commissioners v. Snider et al*, (1925) 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785 was cited with approval. Only if the labour relations matters are demonstrated to be an integral part of a federal work or undertaking do they fall under the exclusive jurisdiction of Parliament. The simple question is whether the regulation of the labour relations of the respondent vis-a-vis its staff located at Malton is an integral part of a federal work or undertaking.

17. There is only one way in which the respondent itself can qualify as a federal work or undertaking, i.e., showing itself to be an undertaking "extending beyond the limits of a province" pursuant to section 92(10)(a). While it is true that it has been established that an "undertaking" need not be a physical thing or work (*In Re Regulation And Control of Radio Communication of Canada*, [1932] 2 D.L.R. 81, [1932] A.C. 304, [1932] 1 W.W.R. 563 (P.C.)), we do not think that the "system" or "arrangement" that the respondent has constructed amounts to anything more than an assemblage or collage of undertakings which themselves in all likelihood would either fall under federal jurisdiction or, in the case of BuffAir, may not come within Canada's national jurisdiction at all. An examination of the undertakings which have qualified under section 92(10)(a) as ones which either are "connecting the provinces" or extending "beyond the provinces" (both phrases we understand to be articulating the common notion of extending beyond one province into either another country or another province) clearly indicates that this category has described either communication systems (e.g., *Toronto v. Bell Canada Telephone Co.* [1905] A.C. 52 (P.C.)) or cartage systems (e.g., *A.-G. Ont. et al. v. Winner et al* [1954] 4 D.L.R. 657, [1954] A.C. 541, 13 W.W.R. (N.S.) 657) which have extended beyond the provincial boundaries on equipment or using equipment owned and operated by one corporate entity. Reading the *Cottrell* decision, *supra*, as a whole, we find that it stands for the proposition that all the enterprises or organizations or undertakings that have been held to be interprovincial undertakings within the meaning of section 92(10)(a) of the *Constitution Act, 1867*, *supra*, have involved themselves in the tangible and physical aspects of the actual carriage of goods or have operated the communication service using their own equipment or facilities. The Court in *Cottrell* decided (at page 491) that Cottrell could not be considered an undertaking within the meaning of section 92(10)(a) because it was not involved in "the tangible or physical aspects of the actual carriage of goods (because) its business is entirely contractual in that it arranges and co-ordinates the interprovincial transportation of its customers goods". Cottrell itself owned none of the railway cars used to move the goods (assembled from customers) across provincial boundaries. The vehicles used to pick up and deliver, both of which generally occurred without crossing provincial limits, preliminary to and

following the transshipment of goods by rail were also not owned or leased by Cottrell, although some were owned by a subsidiary. The Court distinguished this fact situation from the line of cases upholding federal primacy in carriage services and communications systems on this basis (see *A.-G. Ont. v. Winner, supra*; *R. v. Borisko Bros. Quebec Ltd.* (1969), 29 D.L.R. (3d) 754, 9 C.C.C. (2d) 227 (Que. Sess. of Peace); *R. v. Toronto Magistrates, Ex p. Tank Truck Transport Ltd.*, [1960] O.R. 497, 25 D.L.R. (2d) 161 *sub nom. Re Tank Truck Transport Ltd.* (H.C.); affirmed [1963] 1 O.R. 272, 36 D.L.R. (2d) 636 (C.A.); *Capital Cities Communications Inc. v. C.R.T.C.* [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609 (S.C.C.) *City of Toronto v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (P.C); *R. v. Cooksville Magistrate's Court, Ex p. Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84, 46 D.L.R. (2d) 700, 65 C.L.L.C. 147 (H.C.); *Re Pacific Produce Delivery & Warehouses Ltd. and Retail, Wholesale & Department Store Union, Local No. 580* (1974), 44 D.L.R. (3d) 130, [1974] 3 W.W.R. 389 *sub nom. Pacific Produce Delivery & Warehouses Ltd. v. Labour Relations Board* (B.C.C.A.); *R. v. Letco Bulk Carriers Ltd.* (1978), 18 O.R. (2d) 562, 83 D.L.R. (3d) 252, 39 C.C.C. (2d) 210 (Ont. Co. Ct.); *Re Kleysen's Cartage Co. Ltd. and Motor Carrier Board of Manitoba* (1965), 48 D.L.R. (2d) 716, 51 W.W.R. 218 (Man. C.A.). The Court at page 492 agreed with and amplified upon a Federal Court of Appeal's assessment, in the course of determining that Cottrell's subsidiary was not to be an undertaking within the meaning of section 92(10)(a) (*Cannet Freight Cartage Ltd., supra*), that the only undertaking in the carriage system Cottrell had arranged was the railway company. At page 492 the Court had this to say:

The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it could contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company and become the shipper itself, does not make Cottrell anything other than a shipper. *The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867.* Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract. To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. This would be an unreasonable interpretation of the section in question.

(emphasis added)

18. Although in the *Cottrell/Cannet* decisions the federal undertaking is identified specifically as the Canadian National Railway, which was the railway used by Cottrell, the reasoning is not limited to cargo or freight forwarders who use the railways or scheduled airlines. We find the reasoning to be applicable to the respondent, a cargo or freight forwarder which has contracts with Air Niagara, the owner/operator of small air cargo plane or planes used, and with BuffAir, the owner/operator of flatbed trucks used. We agree with counsel for the applicant that the only difference between the two situations is size. In the latter the cargo or freight forwarder has greater means and power to dictate schedules to a small air carrier which can be more responsive to the needs of the purchaser of its service. This difference should

not mislead or take away from the essential fact that the arrangement is purely “contractual” and the relationship is that of a freight forwarder to a commercial carrier, i.e., a carrier who for money payment agrees to move goods. For the same reasons the relationship between the respondent and BuffAir is not essentially different from the contractual arrangements common between freight forwarders and trucking operations. The non-essential difference is size and usage. For all these reasons we have concluded that the respondent’s operations into and from the United States do not make it a federal undertaking within the meaning of sections 92(10)(a) and 9(29) of the *Constitution Act, 1867, supra*;

19. Insofar as the alternate argument is concerned, we cannot agree that the respondent is integral to an undertaking which extends beyond the province. Although the respondent attempted in this aspect of its argument to refer us back to the international system (Canada to U.S.) as the undertaking to which it was integral, we find this tautological. In order to succeed in this argument, a clear federal undertaking must be first identified and then the operations of the respondent related to it (see the *Stevedores* case, *supra*; *Airgo Agency Limited*, *supra*; *Montcalm Construction Inc.*, *supra*; *Paul L’Anglais Inc.*, *supra*). Having rejected the argument that the respondent’s system or arrangement itself is a federal undertaking, it must be established, to succeed under the alternate argument, that the respondent is so integrated with Air Niagara and BuffAir that the respondent is “essential” to them. It is important to point out immediately that most cases cited above where this argument has been considered, dealt with relationships where a company was supplying services to or upon a clearly federal undertaking. However, on the facts before us and before the Board in *Airgo*, an acknowledged federal undertaking was supplying a service to the operation, trying to establish it was integral to the federal undertaking. In *Airgo*, *supra*, relying on previous decisions of the Board rejecting the notion that a freight forwarding company could be integral (in the constitutional sense) to railways, the Board specifically rejected the notion that a freight forwarder could be integral to commercial airlines in the following way:

16. These issues have been previously addressed both by this Board and in the courts in railway cases. In *Ottor Freightways* [1975] OLRB Rep. Jan. 1 the Board was called upon to determine whether a freight forwarding company operating by rail was in the federal or provincial jurisdiction with respect to labour relations. The company had terminals in Toronto and Ottawa and was involved in carrying freight to points in Quebec out of its Ottawa terminal. Goods were pooled in Toronto and loaded on freight cars bound for Ottawa, where they were unloaded and delivered in the respondent’s trucks within a twenty mile radius of Ottawa, including Hull and Gatineau. The Board found that it did not have jurisdiction because the respondent’s trucking operation crossed provincial lines. While it found that the company was an undertaking connecting provinces, the Board specifically rejected the alternative argument that the respondent’s link to the Canadian Pacific Railway brought it within the federal jurisdiction as an undertaking integral to railways. The Board distinguished the *Stevedoring* case on the basis that stevedores perform a function essential to shipping and therefore are an integral part of it. It also declined to follow an earlier Board decision, *H’WK Forwarding Ltd.* [1970] OLRB Rep. Mar. 1450, which had found a freight forwarding company to be an undertaking integrally connected with railways. The Board reasoned as follows (pp. 4-7):

Thus, relying upon *Attorney-General for Ontario et al v. Winner et al*,

Winner et al v. S.M.T. (Eastern Ltd.) et al [1954] 4 D.L.R. 657 (J.C.P.C.); *Regina v. Manitoba Labour Board ex parte Invictus Ltd.* (1968) 65 D.L.R. (2d) 517; *Re Tank Truck Transport Ltd.* (1961), 25 D.L.R. (2d) 161; and *Regina v. Cooksville Magistrate's Court, ex parte Liquid Cargo Lines Ltd.* (1965), 46 D.L.R. (2d) 700, we rule that the respondent's business is an undertaking that connects the Province of Ontario with the Province of Quebec and its labour relations is therefore regulated by the *Canada Labour Code* . . .

Therefore the Board must dismiss this application on the preceding basis and this basis alone. We would note that this has been the foundation to all the preceding Board decisions involving freight forwarding companies save for *General Truck Drivers' Union, Local 938 and H'WK Forwarding Ltd.* [1970] OLRB M.R. p. 1450; (see *General Truck Drivers' Union, Local 938 and Hendric and Co. Ltd.* [1965] OLRB M.R. p. 646; *Canadian Transportation Workers Union #197 and Wilson's Truck Lines Ltd. and General Truck Drivers' Union, Local 938* [1970] OLRB M.R. p. 204; *Teamsters Local Union 879 and Crown Moving and Storage, operated by Donald W. Murray Movers Ltd.* [1973] OLRB M.R. p. 119; and *David Beaton v. General Truck Drivers' Union, Local 938 and Consolidated Fastfrate Ltd.* [1974] OLRB M.R. p.269), and with all due respect, we cannot accept the reasoning outlined in the *H'WK Forwarding Ltd.*, decision *supra*, and cannot do so for the following reasons.

The panel in *H'WK Forwarding Ltd.* did not focus on the intrinsic inter-provinciality of the company's activities in that case (and the nature of the business in that case did extend outside of Ontario on a regular basis) but rather rested its reasoning upon the *Eastern Canada Stevedoring Co.* case, *supra*, holding that the employees of the freight forwarder were integrally related to railways and railways are a federal undertaking in their own right. And, in fact, this is the second "leg" to the respondent's argument in the application before us today in that, Mr. Filion, counsel to the respondent, relied upon the *H'WK Forwarding Ltd.* case, *supra*, as well as a more recent case of the Board — *Teamsters Union, Local 938 and Centeast Auto Terminal Ltd. and Canadian Brotherhood of Railway, Transport and General Workers* [1974] OLRB M.R. 67, (a case which we believe correctly applied *Eastern Canada Stevedoring Co.*, *supra*, but a case involving facts that are substantially different than those before us. But, we believe that when the constitutional law test in this area is applied to a freight forwarder's operation that exists solely within a Province, it cannot be said that such an activity forms an integral part of and is necessarily incidental to the operation of a railway as defined under the exceptions to "local works and undertakings" in section 92(10)(a) of the *British North America Act*. Rather we believe that, while none are on all fours with the facts at hand, cases like *Murray Hill Limousine Service Limited v. Sinclair Batson et al* 66 C.L.L.C. 14,143; *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al* (1967), 62 D.L.R. (2d) 270; *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al* (1960), 24 D.L.R. (2d) 673; *Bachmeier Diamond and Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill and Smelter Workers' Local Union*

Number 913 (1962), 35 D.L.R. (2d) 241 (Sask. C.A.); and *Teamsters International Union Local 990 and North Shore Supply Co. Ltd.*, File No. 5791-74-R, more appropriately describe the relationship of freight forwarders vis-a-vis the railways — the relationship is one of convenience to freight forwarders and of an incidental or tertiary benefit to railways.

In *Eastern Canada Stevedoring Co.*, *supra*, the company's operations consisted exclusively of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies and the work was carried on under the authority and supervision of the ships' officers. Therefore, the work that was being done was something that the companies engaged in the federal undertaking (navigation and shipping) had to have done for them and to this end they contracted another company and that company thereby became integrally related to them. Similarly in *Centeast Auto Terminal Ltd.*, *supra*, the Canadian National Railway had contracted with foreign automobile manufacturers to transport their automobiles to customers in Canada. And obviously, to fulfil this obligation Canadian National Railway had to unload and store the vehicles until they were picked up. But Canadian National Railway contracted out this integral function of their railway responsibility to a specialized concern and the Board found, by reason of this contact — a contract that was a necessary aspect of the railway's business — that the specialized concern had become an integral part of and necessarily incidental to Canadian National Railway.

However, in the case before us Canadian Pacific Railway has not sought out the respondent and engaged it to perform an integral aspect of the railway's responsibilities. Rather, the respondent is primarily engaged in servicing its own customers (i.e., delivering their goods, etc.) and it has chosen to do this, in part, by rail as opposed to "over the road". Therefore while Canadian Pacific Railway obviously enjoys such patronage it is in no way an integral part of its operations. It is convenient but is in no way necessary or integral to the operation of a railway. In other words while it is convenient to the railways to have only one customer the primary purpose or benefit of freight forwarding is to serve the many customers who deal with the freight forwarders, and therefore the benefit flowing to the railways is only of a tertiary nature. (This perspective is very nicely developed in relation to airline limousine services in *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al*, *supra*, p. 277). Accordingly an enterprise cannot parasitically and unilaterally make itself an integral part of a federal undertaking unless it is performing a service that is of a primary value to that undertaking and requested by the federal undertaking on that basis. In the facts before us the respondent has merely agreed to transport *its* customers' goods to some other geographical point and has elected to do this by rail. It could have elected to do it by truck or by air but chose the rail. This election is to its own benefit and convenience and is not an integral part of Canadian Pacific Railway's activities. (Canadian Pacific Railway is only a passive medium in the relationship with the respondent.)

Or another way to have this same perspective is to examine the primary

purpose and function of the respondent's business. This perspective forces one to look to the respondent's customers — not to Canadian Pacific Railway. The respondent delivers matters to and from railroad terminals for the customers — not the railroad. In other words it [sic] primary value, or nature of the respondent's business, is that of a parochial delivery agent and only incidentally does the railroad become involved. It is this perspective which distinguishes these facts from *Letters Carriers' Union of Canada v. Canadian Union of Postal Workers and M & B Enterprises Ltd.* [1974] 1 W.W.R. 452 (S.C.C.), where a trucking firm had been engaged by the Canadian Post Office to handle and collect mail. There the company was working for the Canada Post Office performing one of its functions and the company was therefore an integral part of that activity; (see also *City of Kelowna v. Labour Relations Board of British Columbia and C.U.P.E., Local No. 338*, 74 C.L.L.C. 14,207 (B.C.S.C.)). Whereas had the arrangement been one of numerous customers asking the trucking firm to deliver mail to the Post Office the relationship with the Post Office would have been quite collateral or secondary.

While both the *Airgo* and *Ottor* decisions emphasize exclusivity, the more important emphasis for our purpose is the fact that the freight forwarders were not performing a "service" for the railways or the air carriers, as were the stevedores or the trucking firm in the *Stevedores* case, *supra*, and the *Letter Carriers' Union* case, *supra*, respectively, but rather the railways or air carriers were performing a service for the freight forwarders. Seen in this light, it is clear that, notwithstanding the reduced size and greater responsiveness of Air Niagara and BuffAir, Air Niagara and BuffAir are performing services on behalf of the respondent. On that basis the second alternative argument must fail.

20. We therefore find that this application is within our jurisdictional competence. This matter is referred to the Registrar so that dates for further hearings may be set. We are not seized in this matter.

0728-84-R Retail, Wholesale and Department Store Union, Local 414, Applicant, v. 564070 Ontario Inc., c.o.b. as **Gilham Foods**, Greg Guilfoil and Doug Hann, Respondents, v. Dominion Stores Ltd., Intervener

Sale of a Business — Dominion store closed in August 1983 — Two Dominion managers purchasing fixed assets and sub-leasing abandoned premises from Dominion — Opening new retail food store in March 1984 after retiring from Dominion — Dominion subsidiary major supplier for new store — Not sale of a business

BEFORE: Paula Knopf, Vice-Chairman, and Board Members J. D. Bell and H. Kobryn.

APPEARANCES: *David I. Bloom and Robert McKay for the applicant; R. W. Kitchen and Greg Guilfoil for the respondents; no one appearing for the intervener.*

DECISION OF THE BOARD; October 5, 1984

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2. This is an application under section 63 of the *Labour Relations Act* in which the applicant trade union seeks a declaration that the respondent is bound by a collective agreement entered into by the applicant and Dominion Stores Ltd. (hereinafter referred to as “Dominion”). The respondents oppose the granting of any such declaration.

3. The facts of the case are not really in dispute. The dispute itself revolves around the impact of those facts. In 1983, Dominion Stores had been operating a retail food store at a location known as 225 King Street in Bowmanville, Ontario. On August 13, 1983, Dominion closed that store. On March 28, 1984, the respondents opened a retail food operation called Gilham Family Foods. The application alleges a sale of business within the meaning of section 63 between Dominion Stores and Gilham Foods (hereinafter referred to as “Gilham”). Therefore, all the circumstances of the respondents’ opening of business must be explored.

4. The only witness called upon to testify was Greg Guilfoil, who is a principal of Gilham. In 1983, he and his partner, Doug Hann, were managers for Dominion Stores in other locations. They both had been Dominion store managers for a number of years. Their stores were located in the same Dominion corporate supervision district or area as the Bowmanville location. At a regular area managers’ meeting which was held approximately three weeks prior to August 13, 1983, Messrs. Guilfoil and Hann learned about Dominion’s decision to close down the Bowmanville location because of insufficient sales volume.

5. Because he was a manager in that area, Mr. Guilfoil observed the procedures Dominion Stores utilized in the closing of its Bowmanville location. Prior to closing, Dominion displayed and delivered notices to its customers of the closing and urged them to continue shopping at Dominions at its closest alternative location. Closing sale specials were also advertised. After closing, stock which had not been sold was transferred to other Dominion stores in the same district. The twelve district managers met in the store the last week of its operation and requisitioned or took equipment for their own stores. The remaining functional and movable equipment was taken back to Dominion’s central warehouse in Toronto. Basically all that was left in the store were fixed features such as meat and dairy counters, refrigerator units and compressors. All Dominion store signs and logo identifications were removed from

the store. Windows were painted over. One set of lights was left on on the inside of the store with minimum heat left operating. The maintenance of the building and the parking lot were abandoned by Dominion and snow was left to accumulate over the winter months. Full-time employees were transferred to other stores in accordance with seniority and either allowed to bump junior employees or offered "best for less" positions. Mr. Guilfoil had no knowledge of what became of the part-time employees.

6. In the meantime, Messrs. Guilfoil and Hann (together with a third person who later withdrew) decided to enter into negotiations for a sublease of the Bowmanville premises with the idea of starting their own business. They authorized Mr. Tom Locke to enter negotiations with Dominion Stores on their behalf as undisclosed principals. Because of their years of service and employment security with Dominion, they did not want to jeopardize their positions unless and until it was necessary. By December the 6, 1983, all but the final technicalities of a sublease had been agreed to. Messrs. Locke and Guilfoil then met with Dominion's property manager, Dennis O'Neill, to discuss the terms and it was at this meeting that Mr. Guilfoil first made his involvement known. Mr. O'Neill agreed to keep Mr. Guilfoil's identity a secret to management even then because Mr. Guilfoil (as well as Mr. Hann) was continuing to work for Dominion as store manager during negotiations. An offer to sublease was signed on December the 6th. To date, the the final details of the sublease have not been executed but Dominion Stores and Gilham are operating basically as if the offer was a sublease. Mr. O'Neill gave Mr. Guilfoil keys to go through to inspect the Bowmanville store at that time. A list of equipment in the store was supplied to Mr. Guilfoil. Messrs. Guilfoil and Hann offered to buy the fixed assets that remained in the store together with several smaller items. The mutually acceptable terms of purchase of these assets was tied together with the execution of the lease. An agreed price was determined.

7. Once these negotiations were settled and financing for the project was obtained through the Royal Bank and the federal government, Messrs. Hann and Guilfoil set about preparing the store for its opening. Together with their wives, they personally did the physical work of painting, rewiring, relamping, and cleaning the store and its equipment. They even constructed and erected their own outside signboard.

8. The evidence establishes that the economics of the opening of the store were follows:

\$66,000 — fixed assets purchased from Dominion Stores;

approximately \$20,000-\$25,000 — additional assets purchased for equipping the store;

approximately \$10,000 — spent on materials and equipment for renovation and refurbishing;

approximately \$120,000 — inventory for start-up.

9. Advertisements were placed in local newspapers to promote the opening of the Gilham store. Teaser ads were placed and then followed by references to special bargains and services that the store would employ. Nothing in the adds referred to Dominion Stores.

10. When Gilham opened in March of 1984, it had two full-time employees and eight or nine part-time employees. Of the full-time employees, the meat manager had worked

immediately previously for a factory. Sometime in the past he had worked for Dominion Stores for a short period of time. The head cashier had worked for Dominion Stores in Bowmanville when it was open, but was approached by Mr. Guilfoil because he knew her and because she was about to be put on a part-time assignment in her new Dominion location. Of the 180 applicants for the part-time jobs, none came from former Dominion Store employees.

11. Gilham receives its inventory through a number of sources. The majority of purchases have been done through a wholesale supplier called "Willett" which is a subsidiary of Dominion Stores. Approximately 80% of produce and 25% of groceries have been purchased through Willett's. The arrangement with Willett is done on a weekly basis and is cancellable on either party's option, at will. However, by the sublease agreement, Gilham receives a discount when it deals with Willett. Despite this, Mr. Guilfoil indicated that he is now using another wholesale supplier more frequently because it seems to be to their advantage to do so.

12. The store is located in the midst of a residential area. There are 4 or 5 other retail food stores within a half mile area of the store. All are within walking distance from each other and the surrounding residential districts.

13. Prior to closing, Dominion Stores took in approximately \$40,000 to \$50,000 gross volume of sales per week. At the time of the hearing, Gilham is grossing approximately \$19,000 in volume per week. The draft lease with Dominion Stores contains a clause linking gross sales to rent once a certain volume of sales is achieved. However, that figure has not yet been reached.

Part II — Argument

14. The union argued that the facts of the case sustain the allegation of a sale of business. Counsel for the union stressed the concept of the importance of location in the retail food industry because of the perception that goodwill runs with the location and that people will continue to shop where they are used to shopping. The following cases were cited: *Valencia Foods*, [1984] OLRB Rep. May 733; *Queensway Foods*, [1984] OLRB Rep. Feb. 358; *Dutch Boy Food Markets*, 65 CLLC ¶16,051; *More Groceteria Limited*, [1980] OLRB Rep. April 486. The union further stressed that Dominion Stores no longer competes in the area, has provided managerial expertise in the persons of Messrs. Guilfoil and Hann and is the major supplier of produce through its subsidiary, Willett. Further, Dominion Stores provided the location, two-thirds of the value of assets necessary to put the store in operation and one employee. Therefore, the union argues that the indicia of a sale exist.

15. In response, counsel for Gilham argued that what has occurred here is a mere incidental transfer of unwanted assets by Dominion Stores rather than the sale of an ongoing concern. Counsel for Gilham relies on this distinction as set forth in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at paragraphs 29, 30 and 44. Gilham's counsel also asks the Board to keep in mind the unquantified yet significant contribution of Messrs. Hann and Guilfoil and their wives in terms of assessing the proportion of assets and costs of starting the operation. He also stressed that there was no financing, purchasing of inventory, agreement not to compete, purchase of goodwill, or even the application of former employees for jobs to link Dominion with Gilham. Regarding goodwill in particular, it was stressed the fact that the lengthy period of time between Dominion's closing and Gilham's opening, the abandonment of the premises over the winter months together with the lack of effort to preserve goodwill should be combined to convince this Board that no goodwill remained inherent in this location. It was argued that the dramatic decrease in volume of sales amounts to the ultimate proof of

this. The Board was also referred to the cases of *Darrigo Foods*, [1980] OLRB Rep. Jan 29 and *Zehrs Markets Limited*, [1974] OLRB Rep. May 331. Finally, counsel for Gilham suggested that the managerial skills of Messrs. Hann and Guilfoil must be seen as personal to themselves alone and not attributable to Dominion Stores as something that could be transported to Gilham's.

Part III — The Decision

16. The basic rules governing the successorship issue are established in section 63 of the *Labour Relations Act*:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade union continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

17. The effect of section 63 has been described in *Marvell Jewellery*, [1975] OLRB Rep. Sep. 733:

Section 55 [now 63] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with the change of employer. To provide permanence, the obligation flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

18. The intent of section 63 has been articulated in *Metropolitan Parking Inc.*, *supra* at page 1199, paragraph 20:

The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interest of employees will be at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both. Of course, the transfer of the business is not the only occurrence which could frustrate employee expectations. A re-organization of the production process, the introduction of "job destroying" technological change or a geographic move beyond the scope of the collective agreement will also materially change the industrial relations *status quo*. A business transfer, however, involves a new employer and raises legal problems of an entirely different order which cannot easily be accommodated in a bilateral bargaining process. It is to these problems that section 55 [now 63] is addressed.

19. There are two questions to address in a section 63 application. First, has there been a "sale" within the extended statutory definition of that term? Second, does what has been "sold", "transferred" or "disposed" constitute a "business" or a "part of a business". The first question is not the issue in this case. The real question is whether there has been a sale of Dominion's business or a part of its business.

20. This Board has dealt many times with the question of the alleged sale of businesses in the retail food industry. The cases, their principles and their applications have been thoroughly reviewed recently in *Queensway Food Limited*, *supra*. From the summary in that case it can be seen that several relevant principles emerge. First and foremost, each case must be decided based on a consideration of all the particular facts and circumstances of the transaction. However, certain indicia of sale or lack of sale exist. For example, the existence of a restrictive covenant after a transfer may conclusively establish a sale of business, but the absence of such a covenant does not establish the contrary where the facts of the industry militate otherwise. See *Dutch Boy Food Markets*, *supra*. Further, with the exception of a name, a retail food business may have no goodwill to give or withhold from a purchaser. Since goodwill is largely dependent on the habits of customers to continue patronizing the locale, goodwill has come to be considered inherent in the premises themselves. See *Dutch Boy Food Markets*, *supra*. A company's disposal of unwanted assets at the time of closure and the public advertising urging its customers to patronize its stores at another location can be considered indicia of a change of location rather than a sale. See *Sunnybrook Food Markets*, [1966] OLRB Rep. Oct. 53. A significant hiatus in time between the closing of one corporation store and the opening of another can weigh against the finding that the company has transferred part of its business to the second one. See *Zehrs Markets Limited*, *supra*, *Darrigo Consolidated Holding Inc.*, Board File No. 0266-79-R unreported decision dated January 15, 1980; *Dominion Stores*, [1979] OLRB Rep. July 626. Further, if a company ceases operations where a location is no longer of value to it and unilaterally takes steps to not only close the operation but dispose of the trade fixtures that are no longer useful to the company, this can be seen as a disposition

of trade fixtures rather than a sale. See *Sunnybrook Food Market (Keele Street) Limited*, [1974] OLRB Rep. Jan. 47.

21. With these general principles in mind, we can apply them to the facts and circumstances of this case. It is true that some of the facts presented do tend to point towards a sale of business within the meaning of section 63. This is so especially when viewed in the context of the retail food industry. The respondent has subleased the premises from Dominion Stores and the premises are those which Dominion Stores had previously operated in the same business. The terms of the lease restrict the respondents from using the leased premises for anything other than as a "food supermarket". The signing of the lease was conditional upon the negotiation of the purchase of fixed assets in the premises from Dominion Stores. A subsidiary of Dominion Stores is the major supplier of merchandise for the respondents. Dominion Stores is no longer operating a retail food store in the immediate vicinity. One can only assume that some of Dominion's customers are now shopping at respondents' store.

22. However, there are more persuasive circumstances that compel against a finding of sale of business by Dominion Stores to the respondents in this case. The Dominion store was closed in August of 1983. There is no suggestion that the decision to close was anything other than an independent and unilateral decision by Dominion Stores to shut down that operation for purely economic viability reasons. Prior to closing, Dominion's advertising urged its customers to continue their patronage at another one of its locations. The respondents only became interested in opening the store at the old Dominion location after Dominion's decision had been made and announced. Messrs. Guilfoil and Hann became aware of it a few weeks prior to the actual closing. It was not until after the closing that the respondents authorized an agent to approach Dominion Stores about the possibility of subleasing the premises. Negotiations continued through until early 1984 and indeed the final terms of the lease remain unsettled to date. In the meantime, between the period of Dominion's closing and the respondents' commencing renovations, Dominion Stores left the premises effectually abandoned after removing all the removable features of any value to Dominion Stores and all Dominion's identification from the building. After taking possession of the vacant premises and refurbishing the store some months later, the respondents' store opened in late March of 1984.

23. The only items purchased by the respondents from Dominion were items that Dominion had determined were no longer of any value to any of their operations. The arrangements to make the sale of these assets conditional upon the negotiations for the sublease were made conditional at the request of the respondents and not at Dominion's insistence. The purpose of the condition was to assure the respondents that they would not be committed to a purchase that could not be utilized in its desired location. In addition, the respondents made the purchase conditional upon the respondents being able to arrange credit with major suppliers. Thus, the conditions cannot be viewed as a means of transferring the business by Dominion Stores. Instead, they were independent circumstances of the transaction.

24. Further, the respondents did not acquire any financing from Dominion Stores. The respondents' practice of using a Dominion subsidiary as its major supplier is not very significant given that this arrangement is cancellable on a weekly basis at either party's wish and was never made a condition of the taking of the premises.

25. Any goodwill that may have been inherent with the premises at the time of Dominion's closing in August of 1983 was clearly lost over the months that the location was left abandoned. It is almost impossible to assess why Gilham is not attracting the volume of sales that Dominion

did previously especially given the geographic proximity of competitors in the same market. But it is clear that when Gilham opened in March of 1984, it began and continues to operate on the philosophy that it had to "make a name for itself" and establish its own customers. Thus, Gilham could not and did not rely on any "goodwill" that Dominion may have established while it operated six or seven months earlier.

26. Finally, it cannot be said that the respondents acquired any managerial or other expertise from Dominion. It is true that Messrs. Hann and Guilfoil had been Dominion managerial employees. They gave their notice of their "retirement" to Dominion Stores prior to opening up their own store. However, until the final details of the transaction were in place, they kept their identities as anonymous as possible and operated as much at arm's length with Dominion Stores as was possible under the circumstances. Their former relationship to Dominion Stores is only relevant to the extent that it gave them access to the knowledge of the availability of the premises. It cannot be said that their acquisition of the leasehold obligation was a transfer or a sale by Dominion Stores to the respondents of their expertise. Thus, on balance, we must conclude that Gilham's cannot be considered a continuation or a continuum of a business formerly operated by Dominion Stores at the same location. Instead, it is the opening of an entirely new business that was able to purchase some of Dominion's old assets after it had decided to cease operations on its own.

27. Therefore, the Board finds that the transaction in question in this case did not constitute a sale of business by Dominion Stores to the respondents within the meaning of section 63 of the *Labour Relations Act*.

28. For the foregoing reasons, this application is hereby dismissed.

2271-83-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant, v. **Gordon-Nelson Development Company Limited**, Respondent

Practice and Procedure — Board directing employer to produce documents pursuant to sub-poena — Employer refusing to comply — Board stating case to Divisional Court under s.13 of *Statutory Powers Procedure Act*

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members J. Wilson and S. Cooke.

APPEARANCES: *M. Zigler and Randy Levinson for the applicant; Larry J. Levine and David Cote for the respondent.*

DECISION OF THE BOARD; October 30, 1984

1. This is a request for reconsideration of a decision of the Board dated June 20, 1984 (see, [1984] OLRB Rep. June 806). In that decision the Board determined that certain financial statements were relevant to the issues arising on this complaint, and that those documents should have been produced in response to a subpoena. In face of a refusal to do so, the Board directed that the documents be deposited forthwith with the Registrar of the Board, so that they would be available for inspection, upon reasonable notice, and also for the continuation of the hearing.

2. The background is set out at some length in the Board's initial decision. It is unnecessary to repeat it here. It suffices to say that the union's allegation is that the employer has unlawfully "locked out" a number of its employees. The respondent denies this allegation. The respondent asserts that the employees in question were terminated, and their work transferred to a subcontractor, because the employer was experiencing serious financial difficulties. It was the employer, in its defence, which raised the question of its financial health. The disputed documents are the respondent's audited financial statements.

3. Mr. R. H. Nelson, a co-owner of the respondent, gave *viva voce* evidence before the Board. His evidence, in many respects, was uncertain, imprecise, and, as it turned out, inaccurate — perhaps because he is not intimately involved with the segment of the business involved in this complaint. The respondent operates several nursing homes and the one involved here, shares premises and facilities with a "retirement home" also operated by the respondent. The fact remains, however, that it was the respondent that put its financial health in issue by asserting that it was economic necessity which prompted the termination of the union's members, and when questioned about the extent of those financial difficulties, Mr. Nelson was unable or unwilling to give a very clear or definitive answer.

4. In response to a subpoena requiring production of the respondent's audited financial statements, the respondent produced a document, prepared for the purpose of this litigation. This document (exhibit 10) was said to be based upon the respondent's ledgers and journals, but set out sums very different from those adverted to in Mr. Nelson's earlier testimony. The Board and the complainant were told that this document was accurate and complete and should be accepted because the respondent did not keep and could not reasonably produce a separate record respecting the financial performance of the nursing home. Counsel for the respondent pointed out that the nursing home shared premises and services with a retirement home

operating under a different regulatory framework, and that both businesses were but unincorporated parts of the employer's total enterprise. It was said that exhibit 10 reflected the respondent's best estimate of the financial information respecting the London nursing home (excluding the retirement facility) and that this should be sufficient compliance with the subpoena.

5. The union submitted that in the circumstances it was entitled to have produced the company's actual audited financial statements, rather than some synthetic extract prepared for the purpose of these proceedings. There was no legal basis for the employer's claim to "confidentiality". The documents were relevant and should be produced.

6. The Board agreed with the union's submissions. In response to this ruling, counsel for the employer wrote the following letter to counsel for the complainant union:

Thank you for your letter of July 23, 1984 in connection with the above-noted matter.

I have been instructed to inform you that the Nursing Home is not prepared to comply with the direction of the Board as set out in its decision of June 20, 1984 and as a consequence you will have to take whatever action you deem appropriate.

Please be advised that Larry Levine of Messrs. Robins, Appleby will be representing the Nursing Home in connection with any court application and he has instructions from the Nursing Home to accept service on its behalf.

I will be continuing to represent the Nursing Home in connection with any further proceedings before the Board in this matter and I would ask you to keep me informed of any communications which you may be having with the Board concerning the enforcement of its direction.

The text of that letter leaves no doubt that, despite the Board's direction, the respondent is refusing to produce its audited financial statements. We might note, as we did at paragraph 18 of the Board's initial decision, that at the initial hearings, the respondent did not dispute that there had been proper service effected upon Mr. Gordon, a co-owner and administrator of the nursing home, who would by virtue of his office have control over the documents sought by the subpoena. Likewise, as co-owner of the home, Mr. Nelson, who was then "on the stand" giving evidence, would also be expected to be able to identify and explain the financial statements concerning his business.

7. On September 10, 1984, the Board held a hearing to entertain what appears on the employer's part to be primarily a request for reconsideration of its earlier decision to require production of the company's audited financial statements, and on the union's part a renewal of its request to state a case to the Divisional Court. At that hearing, both the complainant and the respondent were represented by different counsel — apparently in anticipation of subsequent court proceedings. Counsel for the respondent, however, appeared without the assistance of any of its officers. Neither Mr. Nelson nor Mr. Gordon were present. In consequence, Mr. Levine's role was somewhat limited, since he could only repeat to the Board his own instructions, and his own understanding of what had already taken place.

8. Mr. Levine advised the Board that Mr. Nelson had been in error when, in evidence, he had suggested that there were no financial statements in respect of the nursing home aspect of the respondent's operation. In fact, there were documents capable of certification by an accountant (and presumably different from exhibit 10 previously filed) which could be prepared and presented within a week or so. Any error or misunderstanding on Mr. Nelson's part could be rectified by the production of a further and better set of financial statements produced in consultation with the respondent's accountants. It was submitted that the production of these new documents should satisfy the complainant and constitute sufficient compliance with the subpoena.

9. On behalf of the union it was submitted that the whole pattern of the employer's conduct in this case prevents the union from acceding to the proposed compromise. It is too little and too late, and only offered against a background of admitted inaccuracy. Moreover, the better financial statements offered by Mr. Levine on behalf of his client are not yet available for the union's inspection, so it is quite impossible at this point to determine whether they really will be sufficient. For the purpose of completeness, the Board filed with the Board a copy of the affidavit of service of the subpoena upon Mr. R. H. Nelson. It was said by counsel for the respondent that there had not been effective service on Mr. Gordon, the co-owner, despite the concession of counsel then acting on the respondent's behalf, noted at paragraph 19 of the Board's decision. There was no evidence on this point one way or the other.

10. In the circumstances of this case, we do not see any reason to depart from our initial determination or revise our initial view of this matter. The Board issued a subpoena requiring the production of certain documents deemed relevant for a full and fair inquiry into the matters raised on this complaint. The respondent refused to comply. The Board issued a decision directing the production of those documents. Again, the respondent refused to do so. On the request for reconsideration, although suggesting a compromise, the respondent is still indicating that it will not comply with the subpoena as originally framed. In the circumstances, the Board is satisfied that it should accede to the complainant's request to state a case pursuant to section 13 of the *Statutory Powers of Procedure Act* so that the Divisional Court may, on application by the complainant, determine the matter in accordance with that section.

1805-83-R;1806-83-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, Applicant, v. **Harley Transport Limited**, Bryan Cathcart, and Ottor Forwarders Ltd., Respondents

Related Employer — Sale of a Business — Trucking company “brokering” particular runs to son’s company — Renting truck and two tractor trailers — Sale and related employer findings made in circumstances

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members I. M. Stamp and B. L. Armstrong.

APPEARANCES: *John McNamee for the applicant; Martin Addario and Harley Cathcart for the respondent Harley Transport; Bryan Cathcart on his own behalf and Alexander R. Hammond for Ottor Forwarders.*

DECISION OF THE BOARD; October 23, 1984

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2. These are applications pursuant to section 1(4) and section 63 of the *Labour Relations Act* arising out of the commencement of certain trucking operations by Bryan Cathcart (hereinafter referred to as “Bryan”) on October 1, 1983 and thereafter which had, prior to October 1, 1983, been carried out by Harley Transport Limited (hereinafter referred to as “Harley Transport”).

3. The evidence the Board received was by way of agreed facts and by way of the *viva voce* evidence of Harley Cathcart, President of Harley Transport and father of Bryan. No evidence was led on behalf of Bryan or Ottor Forwarders Ltd. (hereinafter referred to as “Ottor”). Counsel for the applicant chose to call no evidence and agreed that the disclosure required by section 1(5) and section 63(13) of the Act had been satisfied.

4. It is agreed that from at least 1973, the time when Harley Transport purchased a trucking operation from Eagle Transport, the applicant represented a bargaining unit of truck drivers, maintenance men, dockmen and helpers employed in connection with these operations. In 1975 Harley Cathcart sold Harley Transport’s trucking operations to Ottor. Between 1975 and March of 1982, when Ottor sold the business back to Harley Transport, we have no evidence as to what activities, if any, Harley Transport carried on or precisely what Mr. Harley Cathcart himself did during this time. None of the details of what was sold by Ottor to Harley Transport in March of 1982 were put into evidence. It is clear that Ottor continued to exist after March of 1982. It is an undisputed fact that Harley Transport entered into an agreement with Ottor, at the time of the sale in 1982, whereby Harley Transport agreed to haul Ottor’s freight between Toronto to Peterborough, to do local (Peterborough) pickup and delivery on Ottor’s behalf and to lease for a monthly payment all of the space, including office space, in Ottor’s Peterborough terminal. It can be inferred that aside from the Toronto to Peterborough run, Ottor engages in some other trucking business. After the 1982 sale and continuing up to the time of the hearing before this Board, there were two telephone lines into the terminal leased by Harley Transport from Ottor — one line for Harley Transport and one line for Ottor. This is so even though there are no Ottor personnel at the terminal — the “switchboard” owned and operated by Harley Transport simply answers one line as “Harley Transport” and one line as “Ottor”. It

is undisputed that there is no corporate link between Harley Transport and Ottor and that there are no common officers or directors.

5. Prior to October 1, 1983, Harley Transport had 13 employees and a relationship (left undescribed to us) with an independent broker, Alexander Hammond, who appeared before this Board as Vice-President of Operations on behalf of Ottor. Mr. Hammond and two of the 13 employees, Mr. Kelly and Mr. Black, serviced the Ottor's Toronto to Peterborough run. Mr. Hammond was recognized by the applicant to be an independent broker but Messrs. Kelly and Black were both represented by the applicant. Mr. Kelly was not licensed to drive a tractor-trailer on the highway, and hence did the local delivery aspect. One of the 13 employees of Harley Transport was Bryan Cathcart who began driving full-time for Harley Transport in the spring of 1983. Although the applicant and Harley Transport had reached agreement that Bryan Cathcart should join the applicant and pay dues, all that occurred was a monthly dues check-off. Harley Cathcart agreed with the counsel for the applicant that Bryan was at the bottom of the seniority list and therefore would not have been entitled to drive a tractor-trailer on the highway for Harley Transport because of his place on the seniority list.

6. Mr. Cathcart's evidence indicates that Harley Transport billed Ottor, on average, \$10,000 — \$11,000 monthly and on a good month as high as \$13,000. We did not receive any evidence comparing this revenue with other sources Harley Transport has. He testified that the rates Harley Transport would charge were agreed at the time of the March 1982 sale. There was no time limit set on the arrangement. Ottor pays on a per trip basis and there is no guarantee of the number of trips or loads. No written agreement between Harley Transport and Ottor was produced. While Mr. Cathcart disagreed with the notion that Ottor's business was a separate part of Harley Transport's business, he did agree that it entailed a separate body of work which could be transferred.

7. After the sale in March of 1982, Harley Transport operated under the terms of a collective agreement which was to expire in August of 1982. In July one of Harley Transport's major customers, Domtar, commenced a strike which was to last until December. Mr. Cathcart testified that during 1982 Harley Transport lost money on a lot of fronts, Domtar and Ottor work included. He said he became concerned enough during the strike about these losses to consider ways to "turn the business around". Steps to do so, however, were not taken until after the conclusion of negotiations for the 1983/84 collective agreement. In August of 1982, a one-year renewal of the collective agreement between Harley Transport and the applicant was negotiated which included a new provision (Article 20.14). This new provision appeared as a part of a grouping identified as "Article 20 — General". It provided as follows:

20.14 The Company shall not contract out any work normally performed by the bargaining unit or employ brokers. However this prohibition shall not apply to Otter [sic] Freightways Ltd.

In August of 1983 negotiations for a renewal of the collective agreement proceeded without mention by Mr. Cathcart of any losses he was experiencing on the Ottor runs notwithstanding that these losses dated back to 1982. Article 20.14 remained as a term of the collective agreement, which was signed on August 20, 1983. This collective agreement also had a one-year term. At the time the collective agreement was signed, Mr. Cathcart disclaimed having any intention of "brokering" Ottor work. Mr. Cathcart claimed that an integral part of the Ottor work going to Bryan was a rejection by Ottor of any rate increase chargeable by Harley Transport. Mr. Cathcart's evidence is ambiguous as to when he first approached the President

of Ottor, Mr. Kerr, to get this increase. At one point he seemed to be testifying to the effect that he approached Mr. Kerr two months prior to September 1983, which would have made it at least July, but he later revised this to have occurred in the period August or September of 1983, and then further revised this to indicate that he was not certain about whether it was before or after the signing of the 1983/84 collective agreement. Ultimately, he testified that he thought he approached Mr. Kerr after the last negotiating meeting with the applicant. Mr. Cathcart admitted that he signed the collective agreement and *then* sat down to see where he could cut down. One area was the Ottor runs. An increase in the rate paid by Ottor was refused by Mr. Kerr. Mr. Cathcart testified that in response to his request for a rate increase Mr. Kerr indicated that Ottor could use its own trucks and trailer to do what Harley Transport was doing for Ottor. Mr. Cathcart then suggested to Mr. Kerr that Ottor's work be "brokered" instead to his son, Bryan. Mr. Cathcart suggested that Mr. Kerr let Bryan try to service Ottor's Peterborough to Toronto runs and deliveries by Harley Transport leasing Bryan the truck and trailer necessary. Mr. Kerr agreed. As to the rationale behind this arrangement, Mr. Cathcart testified that if Harley Transport brokered to Bryan, then Harley Transport would save money because "waiting time" in Toronto would be eliminated. While Mr. Cathcart reiterated on several occasions that the saving would be achieved as a result of the "waiting time" being eliminated, it was never made clear to the Board in sufficient detail precisely how this would be. It appeared after all the evidence was in that the saving was going to be that Harley Transport would no longer have to live with the collective agreement, i.e., either the rates or the method of calculating hours worked. Suffice it to say that Harley Transport was going to be put at an economic advantage if Bryan did the work rather than have Mr. Kerr take the account away entirely.

8. It took two weeks for Bryan to become operational on October 1, 1983. There was no written agreement or contract between Harley Transport and Bryan. It is fair to say that the financial arrangements between them evolved over a period of months. Initially, Harley Transport agreed to rent to Bryan one truck and two trailers, both of which continued to have Harley Transport's colours and logo on them. While only one truck is assigned to him, he can use others if need be. Initially the only amount Bryan agreed to pay was \$2,500 monthly for the use of the truck and trailers. In addition, Bryan agreed to pay Harley Transport for fuel used. Invoices for the month of November 1983 only were produced and reflect separate charges for each of these items (along with antifreeze). No mention was made either in examination-in-chief or on invoice of any payment for anything else than the rental of truck and trailers being included within the \$2,500 payment. In reply Mr. Cathcart testified that the costs of insurance and the necessary "C" licence was taken into account when the \$2,500 was calculated. In December Bryan began to pay certain additional amounts — \$50.00 per month for miscellaneous mechanical work Harley Transport did and would do in connection with the Ottor vehicles that Bryan used to make the local deliveries on behalf of Ottor and \$100.00 per month for secretarial services paid for by Harley Transport and used by Bryan. Bookkeeping services are performed for Harley Transport and Bryan by one person and each one pays her separately for her services. The amount paid was not disclosed. No invoices or cheques were produced in connection with these latter three amounts that have evolved. There is no evidence that Bryan pays anything to anyone for the use of Ottor trucks; indeed, we had no evidence whether Harley Transport paid Ottor anything for them. Bryan operates out of the same terminal as Harley Transport. There is no evidence that Bryan pays either Harley Transport or Ottor for the rental of this dock area. There is no evidence that Bryan concluded any kind of an agreement directly with Ottor. Occasionally, a Harley Transport truck has taken some of Ottor's freight on a Harley Transport run from Toronto to Peterborough and Harley Transport bills Ottor directly for this. Bryan pays nothing to Harley Transport for his use of the dispatcher employed by

Harley Transport. The Ottor trucks are insured by Ottor, as they had been while Harley Transport operated them. There was evidence that Harley Transport and Ottor split the cost of the "city licence" necessary to make deliveries in Ottor's trucks. There was no evidence that there was any splitting arrangement between Bryan and Harley Transport.

9. Bryan is an unincorporated sole proprietorship which was set up and registered with the Ministry of Consumer & Corporate Affairs with the assistance of Harley Transport's lawyers. Bryan has the same accountant as Harley Transport. No evidence was given as to whether Bryan has paid them for these legal and accounting services or what arrangements had been made for their payment. A \$3,000 loan for operating expenses was given by Harley Transport's banker. Neither Harley Transport nor Mr. Cathcart co-signed the loan or put up any capital. Bryan Cathcart's experience in the trucking industry has been gained over a period of 2 to 3 years of part-time work with Harley Transport while he attended university. As the transfer of Ottor's business to him became a reality, he approached Mr. Black and another Harley Transport employee, Mr. Steinoff, to come and work for him. Both agreed. Mr. Hammond continued to function as an "independent broker" vis-a-vis Ottor's work as before. Mr. Cathcart indicated that he could veto the hiring of a driver or the continuation of a driver's employment if there were problems which concerned the safe operation of Harley Transport's trucks. Mr. Kelly, an employee who had previously worked for Harley Transport doing Ottor's Peterborough deliveries, was not hired by Bryan and, consequently, was laid off on October 1, 1983 by Harley Transport. Bryan pays Messrs. Black and Steinoff directly and makes WCB payments on his personal cheques. Mr. Cathcart said he was not consulted by Bryan as to what ought to be paid to Messrs. Black and Steinoff. While he had no idea precisely how much they are paid, he admitted knowing that they are paid less than they were paid when covered by the collective agreement. In cross-examination Mr. Cathcart revealed that while Bryan himself is covered under Harley Transport's benefit plan for its employees, Bryan's employees are not covered. Although Mr. Cathcart said Bryan is billed by Harley Transport for the cost of the plan, we received no evidence of this or payments thereof. Bryan is solely devoted to servicing Ottor's needs for Toronto to Peterborough freight forwarding and deliveries. Harley Cathcart testified that he would expect Bryan to advise him if he commenced hauling for anyone else. He would not allow Bryan to take business away from Harley Transport. Mr. Cathcart testified that Bryan would consult him on any "major decision".

10. There is no evidence to suggest that Ottor and Harley Transport or that Ottor and Bryan are related employers within the meaning of section 1(4). The evidence also does not support a finding of a "sale of a business" pursuant to section 63 as between either Harley Transport and Ottor or Ottor and Bryan. Therefore, these applications in respect of Ottor are dismissed.

11. The only issue is whether Harley Transport and Bryan are related employers and/or whether there has been a sale of a business. Both of these issues must be considered against the backdrop of Article 20.14. The respondent, Harley Transport, conceded that Harley Transport and Bryan were carrying on associated or related businesses but denied there was common control.

12. Relevant portions of sections 63 and 1(4) provide as follows:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

It is well established in Board decisions that both sections were enacted to preserve bargaining rights. Neither was intended to extend bargaining rights nor to extend liabilities that arise under them, when bargaining rights have not in fact been transferred or undermined (see *Re Cassin-Remco Ltd.* (1980) 105 DLR (3d) 138 (Ont. H.C.) and *Valdi*, [1979] OLRB Rep. Aug. 833). Despite this common goal, they were not enacted simultaneously. Section 63 pre-dates section 1(4), in its original form, by approximately 9 years. Section 63's broad definition of “sale” encompasses a large variety of commercial transactions and arrangements. In *Thurco Manufacturing Ltd.*, 65 CLLC ¶16,052, the Board set out the fullest catalogue of them at page 787:

According to its strict signification, the term *sells* is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a, however, the word *sells* has been given a wide definition which includes *lease, transfers and any other manner of*

disposition of the business or part thereof. In legal parlance the word *lease* generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time. The word *transfers*, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally, etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word *transfers* to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word *transfers*, it is our opinion that the generality of the words *any other manner of disposition* is not intended to be in any way limited by or interpreted *ejusdem generis* with the words *leases, or transfers*. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that *sells* includes *leases or transfers*.

(emphasis as in original text)

In the vast majority of cases dealing with section 63 there has been no difficulty in deciding there was or was not a "sale" (see *Abbey Crest*, [1973] OLRB Rep. Mar. 136; *D.H.I. Ltd.*, [1964] OLRB Rep. Aug. 237; *Goodtime Toys Inc.*, [1971] OLRB Rep. July 360; *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733; *R.W.S. Delivery Services Ltd.*, [1972] OLRB Rep. June 632; *Thunder Bay Ambulance Service*, [1978] OLRB Rep. May 467 and *Marathon Investments Ltd.*, [1979] OLRB Rep. July 682 for examples of a variety of transactions which have raised the question of whether a "sale" has occurred). However, the companion concept of "business" required careful, often difficult, analysis to ensure that bargaining rights were not simply attaching to the transfer of equipment or assets, i.e., a mere "idle collection of assets" (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193) or the work of the bargaining unit (see *British American Bank Note Company*, [1979] OLRB Rep. Feb. 72). In *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, at page 542, the Board summarized this analysis as follows:

27. The terms "sale" and "business", have not been exhaustively defined in the Act, in recognition, we think, of the great variety of commercial relationships to which they might be applied, and the need for a case by case elaboration of the law in light of labour law policy. This responsibility has been accorded exclusively to the Board (see sections 63(12), 108, and *R. ex rel. Kitchener Food Market Ltd. et al.* (1966), 54 DLR (2d) 219); and in view of the broad language of section 63 and its intended remedial thrust, the Board has always been disposed to give it a liberal interpretation. The Board has not placed much reliance on the legal form which the business disposition happens to take as between the predecessor and successor. On the other hand, not every business decision which prejudicially affects

bargaining rights will fall within the ambit of section 63, nor will every commercial disposition be a transfer of "part of a business" resulting in a continuation of bargaining rights. The task faced by the Board in any particular case is to give section 63 an interpretation which is consistent with its language and intent, and is also fair to the labour relations context under review.

28. It is seldom very difficult to determine that a predecessor has disposed of "something", nor is it difficult to discern when a trade union's bargaining rights have been prejudicially affected. A more complex question, however, is whether the nature of the disposition and what is disposed of, bring the transaction within the scope of section 63. This requires an assessment of the transaction in its totality and a consideration of its labour relations (rather than commercial law) perspective. In addition to the continuity of the work or jobs (without that, a continuation of the collective bargaining relationship would make little sense) a number of other factors may be relevant to the successor rights issue. In *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691, the Board listed some of these:

"In each case the decisive question is whether or not there is a continuation of the business . . . the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was."

If many of the elements that made up the predecessor's business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a "sale of a business" to which section 63 should apply. If, on the other hand, the alleged successor has its own established business organization by which it services the predecessor's customers, the inference may be otherwise — even if it has acquired some assets or other incidental elements which might be traced to the predecessor. (See also *Kenmir v. Frizzel et al.*, [1968] 1

All E.R. 414, and *R. v. B.C. Labour Relations Board Ex parte. Lodum Holdings Limited* (1969), 3 DLR (3d) 41.)

29. The term “business” is at the heart of section 63, but it is this concept which is the most difficult to define. One usually thinks of a business as a profit-making economic activity, but in the *Labour Relations Act*, the term cannot be so restricted. The Act applies to municipalities, public libraries, universities, school boards, hospitals, and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of “business” must be broad enough to include them. And in the case of undertakings in the service sector, such things as “know how”, managerial systems, and other intangibles may be much more important factors in the overall organization than a particular physical plant or configuration of assets [sic]. In *The Tatham Company Limited*, [1980] OLRB Rep. March 366, the Board suggested the following approach:

“A business is a combination of physical assets and human initiative. It is an economic organization which, in a sense, is more than the sum of its parts. In *Raymond Cote* [1968] OLRB Rep. Mar. 1211, the Board put it this way:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is “the totality of the undertaking”. The *physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success.* The total of these things along with certain intangibles such as goodwill constitute a business.”

(emphasis added)

A business is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market — profitably, in the case of private sector enterprises [sic] but, in any event, efficiently. It is one harmonious whole consisting of many inter-related parts. From a labour relations perspective, however, the employer-employee relationships take on a special significance. From this viewpoint, the importance of the business is that it generates work for employees. The entrepreneurial activities of the business require it to enter the labour market as an employer and, this in turn, may give rise to the collective bargaining relationships to which *The Labour Relations Act* is directed. Section 55 preserves the stability of those estab-

lished collective bargaining relationships if the business, or a coherent part of it, are transferred to a new owner.”

30. The successor rights provisions can also be triggered by the transfer of “part of a business”. . . . But what meaning should be ascribed to the words “part of business”? Clearly, a successorship can arise from the disposition of something less than the whole business; but to what extent can the business be sensibly subdivided? In *The Tatham Company Limited* case, *supra*, the Board defined a “business” as an integrated combination of elements all of which contribute to the business’ existence as a going concern, and all of which, in a literal sense, could be described as a “part” of the business. But if this organization is dismantled (in whole or in part) and its elements are dispersed, would bargaining rights always attach to each of the “pieces”? Surely it could not have been intended that a union’s bargaining rights would be rooted in any single fragment of the respondent’s business organization (see the list of such potential “pieces” in *Culverhouse*, *supra*).

31. The Board has found a transfer of “part of a business” where one of a chain of retail stores has been sold to a competitor (*Loblaws Groceries Limited*, [1973] OLRB Rep. Jan. 72; *More Groceries Limited*, *supra*; where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244), where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Limited*, [1972] OLRB Rep. May 515); and where a slaughter house, which was formerly part of a much larger integrated meat packing company, was transferred to a new owner, (*Beef Terminal*, [1980] OLRB Rep. Aug. 1167)); and where a firm transferred the division or department responsible for one of its product lines (*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508, *Alcan Building Products*, [1968] OLRB Rep. May 213). In *Vaunclair Meats Ltd.*, [1981] OLRB Rep. May 581, the Board summarized the earlier jurisprudence:

“In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization — managerial or employee skills, plant, equipment, “know-how” or goodwill, definable part of the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union’s right to bargain about them, were preserved. The part of the predecessor’s business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor’s configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attribute of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section 55, the established bargaining and collective agreement rights

would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied.”

32. Two important propositions emerge from the cases The first is one we have already mentioned; namely that the way in which a transaction is labelled or characterized has little bearing upon the application of section 63. To describe the relationship between parties as a lease, franchise, or “merely contractual” does not advance the issue one way or the other. Thus it does not assist the respondents to assert . . . that the situation is “just contracting out”. In *Metropolitan Parking Inc.*, *supra*, for example, the Board specifically adverted to a situation which might be described as “subcontracting” but which nevertheless could arguably support an inference of a transfer of “part” of a business:

“The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A’s employees within A’s own organization are ‘contracted out’ to B, and B uses his own managerial skills, plant, equipment and ‘know how’ to supply to A, for a price, the product, services, facilities or components formerly produced by A’s employees. A, therefore, is contracting for the use of B’s economic organization in lieu of his own. A is generating a particular demand, or market, for B’s product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part of a business. If it is clear on the evidence, however, that B is unable to fulfill A’s requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees, or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B’s economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of ‘part of a business’) or merely permitting B to make use of A’s organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or forecloses the application of section 55 (or section 1(4)). If, however, ‘but for’ the transfer of such assets, licences, know-how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A’s business — albeit a part which A no longer wishes to operate itself.”

The Board went on to hold on the facts of that case that a change of

subcontractors did not trigger a successorship as between them, even though there was a continuity of the employees' work.

33. The second proposition emerging from the cases is much more concrete, and was the point upon which *Metropolitan Parking Inc.* turned; namely, that while from a labour relations perspective the importance of the business is the jobs it provides for its employees, "the business" itself is not synonymous with the employees or their work. A transfer of work, by itself, is insufficient to trigger section 63:

"Despite the labour relations focus of the statute 'the business' is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employees may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor's employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYQ Ltd. et al.*, (1978) 1 Can. LRBR 565:

The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees or an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals.* Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protection of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it . . .

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.

(emphasis added)

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 — a case which, like the present one, involved the consequences of a loss of a contract:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

This focus of section 55 is the business entity — the employer's total economic organization — not simply the work which the employees perform."

13. Section 1(4) was first enacted in 1971 to have bargaining rights attach to the appropriate corporate entity where the activities, in which persons are employed, are associated or related and are controlled by more than one corporation or entity. The classic case to which section 1(4) was applicable is the situation described in *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406. It was in the crucible of that fact situation that the basic criteria for finding a related employer relationship pursuant to section 1(4) were forged:

The indicia or criteria which the Board considers relevant in making a determination as to whether the activities of businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are: (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated, the Board's determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesses the more probable it is that the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each other criterion on an individual basis.

The underlying requirement of section 1(4) at that time was that these criteria were required to be present in *contemporaneously* conducted economic or business activities. In 1975 section

1(4) was amended so that bargaining rights could be preserved even where there was *serial* ownership or control but where there may not have been a “transfer” of the tangible indicia of a “business” as defined in section 63 because there are no assets. The best example of this is offered by the construction industry where very little by way of ownership of tangible or fixed assets is necessary to carry on business. In *Brant Erecting and Hoisting Limited*, [1980] OLRB Rep. July 945, the Board summarized the origin and purpose of section 1(4) at paragraph 12:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities [sic] carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55.

With the amendment of section 1(4) in 1975, it became possible that both section 63 and section 1(4) could be applicable to the same fact situation. The variety of transactions and business arrangements which have been found to be a “sale” within the meaning of section 63 also could entail a sufficient retention of ongoing control over the business activities to bring into play section 1(4), (see *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008; *Carroll Electric*, [1982] OLRB Rep. Dec. 1814 and [1983] OLRB Rep. Aug. 1282). We note in passing that even prior to section 1(4) being amended to apply to serial or sequential control or ownership, the Board had found section 63 and section 1(4) to be simultaneously applicable to the same fact situation (see *Canac Shock Absorbers Limited*, [1973] OLRB Rep. Oct. 508). It is fair to say that both sections can only have simultaneous application if all or part of a “business” is involved. Where a partial change has occurred in the ownership or control of an operation, the Board has generally applied section 63 where there is proof that a “severable, coherent

and independent” operation or part of a going concern has been transferred (see *Vaunclair Meats Ltd.*, [1981] OLRB Rep. May 581 and *The Charming Hostess*, *supra*) or that a “discrete, cohesive portion of the economic organization or activities” which comprise the totality of the business has been severed or transferred (see *Metropolitan Parking Inc.*, *supra*). Where the partial change does not satisfy the requirements of section 63, section 1(4) may still apply if there is sufficient retention of control over the core functions of an operation. It is clear then that there may still be legitimate contracting out, the end product of which is the cessation of bargaining rights (see *Kennedy Lodge Inc. et al.*, [1984] OLRB Rep. July 931 and *Metropolitan Parking Inc.*, *supra*).

14. The parties to the collective agreement in this instance have agreed to a provision prohibiting legitimate contracting out. Obviously, the first sentence of Article 20.14 is not a prohibition against “selling” in the sense of disposing of the total business. It is directed at the legitimate contracting out or “brokering” (a term used in the trucking industry virtually synonymously with “contracting out”) of a part of the operations, whether that part is a “part of a business” within the meaning of section 63 or not. The second sentence exempts “Ottor Freightways Limited” from this prohibition. While the applicant argued that this sentence means that Ottor can take its business elsewhere, we cannot accept this as a sensible interpretation. It goes without saying that every customer, including Ottor, can take its business elsewhere. The applicant’s interpretation would have been reasonable if Ottor had been a party to the collective agreement. The only other way the applicant’s contention would have been reasonable is if Ottor had been found by this Board to be a related employer and therefore joined as a party to both the prohibition and the exemption in Article 20.14. In view of the conclusion to which we have come regarding Ottor, the only reasonable interpretation we can place on Article 20.14 is that the Ottor account, which otherwise could not be legitimately contracted or brokered out, could be split off from the bargaining unit/rights held by the applicant. This is perhaps in recognition of the purchases and sales which have taken place between Ottor and Harley Transport over the years and a recognition of the resultant close relationship.

15. The fact situation before us is one of those to which section 63 and section 1(4) are simultaneously applicable. There has been enough of a transfer of components necessary to service the Ottor account to constitute a sale of a part of a business under section 63. There also is the retention of sufficient control by Harley Transport over Bryan’s business activities to allow the application of section 1(4). Harley Transport has permitted Bryan to make use of its organization while retaining ultimate control over him. Everything from the arranging of the agreement with Ottor, to the providing of access to knowledgeable employees, to the evolving nature of payments for the use of all the services and equipment necessary to fulfill Ottor’s requirements, to the limitation on the expansion of the business of Bryan was imposed by Harley Transport or was implemented unilaterally by Harley Transport. It is clear then that this is not legitimate contracting out as contemplated by Article 20.14 of the collective agreement (see *Metropolitan Parking Inc.*, *supra*).

16. One of the major differences between section 63 and section 1(4) is the fact that the application of section 1(4) in any given situation is discretionary. The Board may, even in the face of a clear related employer situation, decide against making a declaration to this effect. Some of the reasons for not granting a section 1(4) declaration have been delay (see *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914), avoidance of certification process (see *Ellwall & Sons Construction Limited*, [1978] OLRB Rep. June 535 and *Inducon Construction of Canada Limited*, [1975] OLRB Rep. April 400), lack of necessity (see *Carroll Electric*, *supra*, August 1983) and abuse of process (see *Total Marketing Inc.*, [1983] OLRB Rep. April

616). The decision to exercise the Board's discretion and apply section 1(4) is necessarily inseparable from a consideration of the question of whether it will achieve, in a better way, the preservation of bargaining rights than section 63. The respondent argued that our discretion ought not to be exercised because

- (1) if there has been an improper contracting out, Article 20.14 can be the subject matter of a grievance under the collective agreement, and
- (2) the applicant has not been able to prove that the setting up of Bryan Cathcart to service Ottor was an "end run" on the applicant.

Dealing with the latter point first, this argument is based on the assumption that if no anti-union motivation or intention is shown, section 1(4) ought not to apply. This assumption is incorrect. It has been pointed out by the Board repeatedly that while section 1(4) is meant to preserve bargaining rights and is often doing so in circumstances which have been created to try to ignore or circumvent collective bargaining obligations, the Board does not *require* this in order for section 1(4) to be applicable (see *Brant Erecting and Hoisting, supra*, quoted in *The Charming Hostess, supra*.) In any event the respondents have not succeeded in persuading us that the arrangement with Bryan was anything more than a means of escaping two inconvenient aspects of the collective agreement, i.e., the rates (together with calculation of hours of work to include waiting time in Toronto for the Ottor loads) and the seniority provisions. We did not have enough information to be able to conclude with certainty that the *methods* by which Bryan did the Ottor work could not have been used or implemented by Harley Transport itself and thereby reduce the costly waiting time to which Harley Transport felt its losses were in part attributable. It seems to us that the greatest saving to Harley Transport was the cessation of the obligations to pay the rates under the collective agreement. Under the arrangement with Bryan, Harley Transport still received revenue from the operation of the truck and trailer and Harley Cathcart's son's continued remuneration was ensured, notwithstanding his relatively low seniority in the bargaining unit, which otherwise would have led to his layoff, if the Ottor work disappeared entirely. The first argument of the respondent is also faulty because it is clear that an arbitrator could only give a remedy against Harley Transport, as party to the collective agreement, and Bryan would not, strictly speaking, be a part of any of its proceedings. We have decided not to defer to the arbitration process for the reasons cited in *Valdi*, [1980] OLRB Rep. Aug. 1254, i.e., arbitration will be remedially inadequate. We think that our remedy, pursuant to section 1(4), will result in a more comprehensive resolution of the erosion of the applicant's bargaining rights which have occurred as a result of the arrangements Harley Transport has made with Ottor and Bryan and recognize that Bryan is not a sufficiently separate organization from Harley Transport. While a declaration of a sale, pursuant to section 63, would confirm bargaining rights in the hived-off portion and confirm the creation of a separate bargaining unit, the bargaining rights of the applicant would not, in the circumstances, be appropriately protected. For one thing, a declaration pursuant to section 63 would result in a separate seniority list and the dilution of bidding rights for Mr. Black and Mr. Steinoff. These things should not occur unless a truly separate organization does the work.

17. Therefore, for all these reasons, we have determined that the applicant should succeed under section 1(4) against Harley Transport and Bryan. The Board hereby declares that Harley Transport Limited and Bryan Cathcart are related employers and that Bryan Cathcart is bound by the collective agreement since the commencement of his operations on October 1, 1983.

1367-84-U St. Catharines Typographical Union Local 416, Complainant, v. High Times Publication Ltd., Respondent

Duty to Bargain in Good Faith — Unfair Labour Practice — Employer refusing to bargain because of presence of former employee discharged from company — Structure and composition of union negotiating team not for employer to determine — Bad faith bargaining

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Mary Cornish, Richard Weatherdon and Linda Preston for the complainant; Keith G. Pedwell, Lisa Nicholls, Jo Anne Pylypiw, Todd Pylypiw and Lou Chonka for the respondent.*

DECISION OF THE BOARD; October 11, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* in which *inter alia*, the union alleges that the company refuses to bargain in good faith for a collective agreement with the union's bargaining committee because of the presence on that committee of one Linda Preston who had been discharged by the company. The company's position is that Preston is no longer an employee and that the circumstances of her discharge make it impossible for the company to bargain so long as Preston is on the committee. The question of the propriety of the discharge of Preston is a matter which is continuing before this panel and has no bearing upon the present issue.

2. The Board hereby confirms the decision given orally at the hearing to the effect that the employer herein is bound to bargain with the union's bargaining committee as structured by the union. As the Board said in the *Journal Publishing Co. of Ottawa Ltd.* case, [1977] OLRB Rep. June 309, at 320, paragraph 47:

The structure and composition of the union's bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union's bargaining team is altered, therefore, amounts to a breach of duty to bargain in good faith — the essence of the wrong being the failure to recognize the union as represented by its properly constituted bargaining team.

3. The Board accordingly finds that the company in the present case, in refusing to bargain with the union's bargaining committee so long as Preston is a member, is bargaining in bad faith contrary to the provisions of the *Labour Relations Act*.

4. The Board accordingly directs the company to meet immediately with the union's bargaining committee, irrespective of its composition, and to bargain in good faith and make every reasonable effort to make a collective agreement.

5. The question of compensation to the union for time lost raised by the union may be argued on the continuation of the hearing with respect to other matters raised in the complaint.

2311-83-R;2368-83-U Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Holiday Juice Ltd.**, Respondent, v. Group of Employees, Objectors

Discharge for Union Activity — Interference in Trade Unions — Practice and Procedure — Remedies — Unfair Labour Practice — Four union supporters laid-off after company becoming aware of organizing activity — Employer reverse onus not satisfied — Cards signed by grievors counted — Consent of parties not required for Board to remain seized for quantum — Compensation not restricted to grievor testifying

BEFORE: Robert D. Howe, Vice-Chairman, and Board Members W. Gibson and S. Cooke.

APPEARANCES: *Lewis Gottheil, Jim O'Donnell and Eric Del Junco for the applicant; L. Bertuzzi, J. Zakoor and D. Kotwicki for the respondent; Raymond Casha and Shukri Juri for the objectors.*

DECISION OF THE BOARD; October 9, 1984

1. File No. 2368-83-U is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the “Union”) alleges that the four grievors named in that complaint (Scott Durham, Ajmer Nirwan, Richard Price, and Barry Storr) have been dealt with by the respondent (also referred to in this decision as the “Company”) contrary to sections 64, 66, and 70 of the Act. Those four individuals were laid off indefinitely by the respondent on January 9, 1984, the date on which the Union filed an application for certification (File No. 2311-83-R). In a decision dated February 6, 1984 concerning that application (reported in [1984] OLRB Rep. Feb. 277), another panel of the Board found the applicant to be a trade union within the meaning of section 1(1)(p) of the Act and further found the following unit to be appropriate for a collective bargaining:

all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

In that decision, the Board also ruled as follows (at pp. 280-281):

11. Scott and Price were clearly employees on the application date because they worked on that day. The Board's practice has been to place someone like Nirwan — who was laid off when he arrived at work — on Schedule A. Storr, who did not work due to his injury, falls on Schedule D and is excluded from the count by the 30/30 rule. Given this determina-

tion, the union is not entitled to certification without a vote — unless the petition is found to be involuntary or the section 89 complaint succeeds.

12. The applicant has filed documentary evidence which establishes that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 18, 1984, the terminal date fixed for this application and the date which the Board established, pursuant to section 103(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act. This evidence is in the form of membership cards containing a combination application for membership and receipt. The applications are signed by the individual employee concerned, and the receipt is countersigned by the collector and acknowledges the payment of five dollars. These cards comply with the membership criteria prescribed by section 1(1)(1) of the Act and established by the Board pursuant to section 103(2)(j). The documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration, attesting to its authenticity. There is nothing to suggest the employees who signed these cards did not do so because they decided of their own free will to be represented by the applicant. Accordingly, in the absence of other evidence relating to membership, the union has a sufficient level of support to be certified pursuant to section 7(3) of the Act without recourse to a vote.

13. However, a group of employees have also filed a petition signed by a number of people who are opposed to the certification of the applicant. This petition contains the names of some individuals who previously signed membership cards and paid one dollar to the applicant, and who thereby became members of the union within the meaning of section 1(1)(1) of the Act. Indeed, less than fifty-five per cent of the employees in the unit, on the application date, signed a card but did not sign the petition. Consequently, if the employees whose names appear on both a card and the petition signed the petition voluntarily, the Board would normally exercise its discretion under section 7(2) of the Act by ordering a vote. Conversely, a petition spawned by improper employer influence, either real or perceived, would be disregarded and would not preclude certification on the basis of membership evidence.

14. The Registrar is directed to consolidate this proceeding with Board File No. 2368-83-U and to schedule a hearing into the voluntariness of the petition and the section 89 complaint at the earliest possible date.

2. Pursuant to that direction, these consolidated matters came on for hearing before the present panel on February 22, 1984, with continuations of hearing on March 30, April 3, May 3, 9, 28, June 8, 21, July 16, and August 21, 1984.

3. Section 89(5) of the Act provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act

as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

In commenting on the effect of that provision, the Board wrote as follows in the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, at paragraph 17:

... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

Similar considerations apply to layoffs. In *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027, a case involving a complaint in respect of the layoff of twenty-three employees, the Board stated (at paragraph 11):

This matter falls within the ambit of section 79(4a) [now section 89(5)] which places the burden of proof in a complaint such as this upon the employer. The Board referred to the nature of the onus which falls to the respondent in these matters in the *Pop Shoppe (Toronto) Limited* case [1976] OLRB Rep. June 299, wherein at paragraph 4 the Board stated:

Section 79(4a) of *The Labour Relations Act* places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer's actions must be devoid of "anti-union animus." (See the *Bushnell* case (1974) 4 O.R. (2d) 332.) The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct. 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 99.)

(See also *Starplex Scientific Division of Canadian Medical Laboratories Limited*, [1981] OLRB Rep. March 346; *Knud Simonsen Industries Limited*, [1980] OLRB Rep. Oct. 1466; and *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645.) With those general principles in mind, the Board will now consider the facts of the present case.

4. During the ten days of hearing of these consolidated matters, the Board heard the evidence of Shukri Juri and Raymond Casha, who appeared on behalf of the objectors; James

Zakoor, the Vice-President and General Manager of the respondent's Toronto sales and distribution office (located in Mississauga) to which these proceedings pertain (referred to in this decision as the "Toronto Branch" or the "Branch"); Morris Wilkes, Toronto Branch Warehouse Manager; Bill Smith, Toronto Branch Assistant Manager; Zenon Wyciskiewicz, Toronto Branch Assistant Warehouse Manager; Dan Kotwicki, the President of the respondent; Jim O'Donnell, an organizer employed by the Teamsters Joint Council; and Rick Price, one of the aforementioned grievors. In addition to the testimony of those nine witnesses, the Board also has before it 19 exhibits which were entered during the course of these proceedings. In making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of the parties concerning that evidence, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what inferences may reasonably be drawn from the totality of the evidence.

5. The respondent's Toronto Branch is a sales and distribution facility for juice produced by the respondent at its Windsor plant and shipped to the Toronto Branch by transport. The respondent also owns and operates sales and distribution centres in London and Windsor, and supplies juice to a number of sales and distribution centres owned by distributors in various other cities.

6. Mr. Zakoor reports to Mr. Kotwicki on all monetary issues, including personnel matters, and reports to Vice-President Charles Jamail on sales and delivery of product. He speaks with each of them on the telephone numerous times in the course of each week concerning business matters.

7. In the period from 1975 to the end of 1983, the work force at the Toronto Branch increased from 10 to 25 employees (in addition to office staff and supervisors). As a result of an unprecedentedly high demand for the Company's products, the Toronto Branch work force increased from 18 (plus one part-time employee working ten hours a week) in April of 1983 to 25 employees in October of 1983. Average sales grew from approximately 20,000 cases per week in the first four months of the year to over 28,000 cases per week in August. In September they decreased to about 24,000 cases per week with a further decrease to approximately 22,000 cases per week in October, 21,500 cases per week in November, and 18,900 cases per week in December. Those decreases resulted from increased competition, the loss of certain major accounts, and the end of the hot summer weather. Despite those decreases in volume, the Toronto Branch work force increased from 24 to 25 in October of 1983, and remained at that level in November, December, and January, until the four grievors were laid off on January 9, 1984. The 25 employees consisted of twelve driver salesmen, five "house call route" deliverymen, and eight "shipping and receiving" warehousemen. Each driver salesman is assigned a particular area and is paid a commission on the juice which he sells to stores and other customers within that area. Deliverymen, on the other hand, perform no sales function and are not paid commission on the juice which they deliver on their "house call" routes.

8. The decreased volume of sales at the Toronto Branch and at other distribution centres gave rise to layoffs at the respondent's Windsor production plant in October of 1983. Mr. Zakoor and Mr. Kotwicki testified that in late October or early November of 1983, Mr. Kotwicki advised Mr. Zakoor that the Toronto Branch would also have to lay off workers unless Mr. Zakoor could justify maintaining the existing work force at the Toronto Branch. Mr. Za-

koor told the Board that he relayed that information to Mr. Smith by telling him that the Branch had too many employees for the volume it was handling. It was Mr. Kotwicki's evidence that he continued to speak with Mr. Zakoor at least once a day after that conversation. He further testified: "I'd say why haven't you done anything [about the layoffs]? Get back to me. Call me later. I'm busy." He also told the Board that he did not press the matter until December because the purchase of the respondent by another company ("Labatts") resulted in an "endless stream of people" from Labatts requiring him to begin using Labatts' forms, change banks, and make other changes which "took up 100% of [his] time in November". It was his evidence that he "finally got to Jim [Zakoor] in December and gave him an ultimatum" to "react immediately" to his direction to lay off "three to five" Toronto Branch employees. It was also his evidence that after that "long and heated" telephone conversation with Mr. Zakoor, he "dictated in a rage" the following memorandum (which is Exhibit #6 in these proceedings):

M E M O

TO: Jim Zakoor DATE: December 8,
1983
FROM: Daniel F. Kotwicki SUBJECT: Layoffs —
Toronto
Branch

This is to confirm our conversation on the telephone regarding laying off four employees at first and possibly two more people in the immediate future depending upon if and when the Toronto Branch is able to increase the poor sales situation.

As we both agreed, it would not be right to lay off the four initial men before Christmas time. When you return from your vacation in Florida, it is your responsibility to lay off indefinitely four people which you will determine. Please get back to me with the names of these people and the reasons for choosing them.

Regards,

"Daniel F. Kotwicki per L.M."

"DICTATED BUT NOT READ"

DFK/lm

9. Mr. Zakoor testified that he prepared the following reply (Exhibit #7) on December 9, 1983:

M E M O

TO: Daniel F. Kotwicki DATE: December 9,
1983

FROM: Jim Zakoor SUBJECT: Toronto
Branch
Layoffs

This memo is in reply to your memo of December 8, 1983 concerning layoffs. First of all, I will not be able to lay anyone off until January 9, 1984 due to the fact that I will be in Florida for two weeks. If you have any objections to this January 9 date, please contact me.

Secondly, the people we have decided to lay off, and the reasons for laying them off are as follows:

<u>Employee Name</u>	<u>Reason For Laying Off</u>	<u>Department</u>
1) Scott Durham	He is the most unproductive employee which we have in any area.	Shipping & Receiving
2) Ajmer Nirwan	He is constantly making mistakes on orders. I believe this is due to a language problem. He doesn't speak very good English.	Shipping & Receiving
3) Rick Price	He has been working for us under a 90 day probationary period, and has disobeyed company policies knowingly. He has also swore at a customer, among other things.	Driver Salesman
4) Barry Storr	Barry is the man with the least seniority on the house call routes. Performance wise, he is a sound employee.	House Call Routes

I hope this information will suffice. If you have any questions, please feel free to contact me.

Regards,

(signed) "Jim Zakoor"

Jim Zakoor

It was also Mr. Zakoor's evidence that after that memo had been given to a transport truck driver for delivery to Windsor, he heard that Bill Smith had hired Rory Forster that day, to commence work on December 12, 1983. It was Mr. Zakoor's evidence that he initially told Mr. Smith to cancel Mr. Forster's hiring, but was convinced by Mr. Smith to keep Mr. Forster on until after Christmas because Mr. Smith would "feel bad" about telling Mr. Forster that

he did not have a job after having just told him that he was hired. However, Mr. Zakoor told the Board that he decided on January 6, 1984 to retain Mr. Forster and lay off Mr. Price because of subsequent incidents involving Mr. Price, including Mr. Price raising his voice in the drivers' room on December 15, 1983 to complain about extra product that he returned on his truck after having himself ordered that product, failing to make a promised delivery to a Brampton Food City store on December 16, 1983, and having relatives in his truck on December 22, 1983 and January 5, 1984.

10. Mr. Zakoor testified that the final decision concerning who would be laid off was made on Friday January 6 or Saturday January 7. It was his evidence that the layoff date of January 9 had been decided upon in December. His explanation for the selection of that date was that he and Mr. Kotwicki did not think that it would be right to lay people off before Christmas, and that the layoff could not take place until after he returned from his December 23, 1983 to January 8, 1984 Christmas vacation because it was "Company policy" that he had to be present for anything like layoffs or discipline. His explanation for laying the employees off on the morning of January 9 with severance pay was that "the Company didn't need them on that Monday" and "wanted to give them as much time as possible to look for another job".

11. On December 7, 1983 the grievor Scott Durham telephoned Jim O'Donnell, an organizer employed by the Teamsters Joint Council since 1981. Mr. Durham told him that some of the respondent's employees were interested in joining the Union. Since Mr. O'Donnell was going to be away from December 9 to December 23, it was decided that the matter would be "put on ice" until January. Mr. O'Donnell made it clear to Mr. Durham that it was important to keep all information about organizational activities away from management for as long as possible. When Mr. Durham telephoned Mr. O'Donnell again on January 3, 1984, a meeting was arranged for 8:00 p.m. on January 5 at the Union hall. Mr. O'Donnell suggested that Mr. Durham put together a committee consisting of two or three of his most trusted fellow employees, and bring them to the meeting. However, ten employees attended the meeting, including the four grievors. In explaining the larger than expected attendance, Mr. Durham told Mr. O'Donnell that he could not control the numbers and did not see anything wrong with bringing the persons who had expressed interest. During that meeting, Mr. Durham sat with Mr. O'Donnell at the head of a "T" shaped table configuration. The tenth employee to arrive at that meeting was Mr. Price, who had been invited to attend the meeting by warehouseman John Sauve on Wednesday January 4. On the following morning, Mr. Price asked Mr. Juri (one of the two circulators of the statement of desire filed in opposition to the certification of the applicant) if he was going to the Union meeting that night. Mr. Juri, who was ten or fifteen feet away, gave no response. The question was overheard by Mr. Durham, who immediately approached Mr. Price and said, "Don't say anything to him. He'll tell management."

12. Mr. Price already knew Mr. O'Donnell as a result of having provided catering truck services to Thibodeau Transport while Mr. O'Donnell was employed there. During that period they became friends who played golf together from time to time. At the Union meeting on January 5 they discussed "old times", including a certification application in which Mr. Price's brother had been an organizer. Mr. Price suggested at that meeting that his brother had been discharged during the organizing campaign, but Mr. O'Donnell disagreed and proceeded to explain what had actually happened. Mr. Price also asked a number of questions at that meeting for his own information and for the information of the other employees who were there. During that meeting, Mr. Nirwan indicated that he had been a union steward. When he volunteered that information, Mr. O'Donnell, who was "looking for someone on the inside" to assist in

organizing the warehousemen, told him that he (Mr. Nirwan) could be of help since (as a warehouseman) he was "on the inside", whereas most of the other persons at the meeting were drivers. During that meeting Union cards were signed by a number of employees, including each of the grievors. Mr. Durham "got the ball rolling" by taking the cards and distributing them to employees along one side of the table.

13. At the January 5 Union meeting, Mr. O'Donnell announced that he would open a room the next day at the Avion Hotel where any other employees interested in joining the Union could drop in and meet with him. Mr. Durham brought two employees to that room. He also served as the collector on some of the membership cards filed by the Union in support of this application.

14. While attending a meeting at Labatts in Toronto on January 6, Mr. Kotwicki received a message from his secretary to call the Company's Transportation Manager in Windsor. Upon doing so, he was advised that the Transportation Manager had learned from a transport driver who had just returned from the Toronto Branch that there were "employee problems" at the Branch. The Board was not provided with details concerning the source and precise content of that information as Mr. Kotwicki's evidence concerning those matters was quite vague, and the Transportation Manager was not called as a witness. Although Mr. Kotwicki told the Board that he did not recall the Transportation Manager telling him that the employees were involved in union organizing activities, we are satisfied that that information was in fact given to him, as Mr. Kotwicki immediately telephoned Mr. Zakoor in Florida and told him, "It seems there's some employee problems. They're trying to organize". Upon receiving that information, Mr. Zakoor, who was not scheduled to fly back to Toronto until Sunday January 8th, immediately changed his ticket and returned to Toronto on Friday afternoon. He also telephoned Bill Smith to arrange for someone to meet him at the airport and drive him to the Toronto Branch. Although Mr. Zakoor suggested that he returned to Toronto early because the weather was bad and he had a lot of work to do on his condominium, he conceded in cross-examination that he would not have returned early but for the telephone call from Mr. Kotwicki, and we are satisfied that his concern about the possibility of organizational activities was the primary motivation for his early return.

15. When he arrived at the Branch at approximately 4:30 p.m. on January 6, Mr. Zakoor met with Mr. Kotwicki and Mr. Jamail. That meeting lasted between 30 and 45 minutes. Although Mr. Zakoor's recollection of other events was for the most part quite detailed, he professed a marked inability to recall what was said at that meeting. Nevertheless, it is relatively clear from the evidence as a whole that the senior management officials present at that meeting discussed their concern about suspected union organizational activities, and attempted to identify complaints or other areas of employee dissatisfaction. At that meeting Mr. Kotwicki expressed the view that a union was not needed or desirable.

16. Mr. Zakoor testified that after Messrs. Kotwicki and Jamail left to return to Windsor, he met with Mr. Smith to ask him "what was going on" and "what was the problem". He further testified that Mr. Smith told him that he (Mr. Smith) had asked Ken Youngson (one of the driver salesmen employed at the Branch) "what was going on", but that Mr. Youngson "didn't tell him anything". In his evidence before the Board, Mr. Smith testified that he spoke with Mr. Youngson because he had "seen some of the drivers milling about" and wanted to know "if there was some disagreement with management" as "whenever [he] would approach, [the employees milling about] would just shut up". He also testified that when Mr. Youngson came into his office (for an unrelated purpose), he told Mr. Youngson that he wanted to talk to him,

and asked Mr. Youngson to accompany him to the Company's boardroom so that they could talk privately. Mr. Smith then testified that he said to Mr. Youngson, "I heard you guys were milling about. Is there a letter being written or a petition against management?" Mr. Smith denied asking Mr. Youngson about union activities or organizing, but ultimately conceded that he could not remember "the exact words" that he used. Under the circumstances, we are satisfied that while Mr. Smith may not have used the word "union" or the word "organizing", he took Mr. Youngson to the boardroom for the purpose of gaining information about suspected union organizational activity. Although Mr. Youngson did not provide any specific information, his noncommittal response that he would rather not say anything one way or the other about it could only have served to confirm Mr. Smith's original suspicions.

17. Mr. Smith denied having told Mr. Zakoor on Friday January 6th about his conversation with Mr. Youngson. It was his evidence that he did not mention this conversation to Mr. Zakoor until January 7 when he went to the Branch at Mr. Zakoor's request to attend a meeting with Mr. Zakoor and Mr. Wilkes. At that meeting, which lasted between one and two hours, the possible presence of a union was discussed and it was decided that the four grievors would be laid off on the following Monday. The evidence given by the Company witnesses with respect to the details of the discussions which took place at that meeting was quite vague and unsatisfactory, and conveyed to the Board a strong impression that they had something to hide.

18. On Saturday January 7, Messrs. Kotwicki and Jamail (who had returned to Windsor) had a conference call with Mr. Zakoor and Larry Bertuzzi, the respondent's counsel, to discuss the legal ramifications of the employees' suspected organizational activities. The details of Mr. Bertuzzi's advice were (quite properly) not placed before the Board. However, the evidence does indicate that the Company was advised to proceed with "business as usual".

19. On Monday, January 9, Mr. Zakoor came to the Branch at 5:00 a.m. because he "wanted to see what was going on". Although he testified that that was not the first time that he had arrived at work at that time, he conceded that it was rare for him to be there so early. He also testified that he came early that morning because he "wanted to be there when the layoffs were carried out". Mr. Smith, who usually arrives at the Branch around 8:00 a.m., also came to work quite early that morning, arriving sometime between 5:30 and 6:00 o'clock.

20. Mr. Durham put in over two hours of work on January 9 before being told by Mr. Smith (on the instructions of Mr. Zakoor) that he was being "laid off indefinitely" for "business reasons". Mr. Zakoor's explanation for requiring Mr. Durham to work from 5:00 a.m. until after 7:00 a.m. before laying him off was that the respondent "needed him because they didn't have anyone else scheduled". Mr. Price arrived a bit late that morning because he had a problem with his car. As he was leaving the drivers' room to go out and load his truck, Mr. Smith said that he wanted to see him after he finished loading. Accordingly, Mr. Price proceeded to load his truck and then accompanied Mr. Smith to the boardroom where he was also told that he was being laid off indefinitely for business reasons. Mr. Nirwan was given similar information that morning. Mr. Zakoor was not present when any of those three grievors were told about their layoff.

21. Mr. Storr telephoned the Company early in the morning on January 9 and indicated that he was unable to work that day due to a knee injury which he had suffered during the weekend and for which he intended to seek medical help. After apprising Mr. Zakoor of that information, Mr. Smith was directed by Mr. Zakoor to instruct Mr. Storr to come to the Branch

that day after his doctor's appointment. When he did so, he was also told by Mr. Smith (in the presence of Mr. Zakoor) that he was being laid off indefinitely for business reasons.

22. The grievors Scott Durham and Ajmer Nirwan were warehousemen who commenced employment with the respondent on August 8, 1983 and September 14, 1983, respectively. Neither of them was the "junior employee" in the shipping and receiving department at the time of the layoff, as there were two other employees in that department who were hired after Mr. Nirwan, and a third employee hired after Mr. Durham (but before Mr. Nirwan). The grievor Barry Storr commenced employment with the respondent on October 17, 1983 as a house call route driver and was the most junior employee in that category at the time of the layoff. The grievor Richard Price commenced employment with the respondent on October 31, 1983 as a driver salesman. At his employment interview with Mr. Smith, Mr. Price asked about layoffs and was told that no one had ever been laid off. When he expressed concern to Mr. Smith in the first week of December that his route was slowing down, Mr. Smith told him, "It's normal. This time of year it slows down. It'll pick up in mid-December. However, after New Year's it will be slow for the first three or four weeks. Come February it will pick up again." (The Branch's weekly sales volume data for 1981, 1982, and 1983 (Exhibits 2, 3A, and 4A) reflect a seasonal decline in January, with a significant increase in February. For example, average weekly sales of 13,223 cases in January of 1982 rose to a weekly average of 15,993 cases in February of that year). As indicated above, at the time of his layoff on January 9, 1984, Mr. Price was not the junior driver salesman as another driver salesman (Rory Forster) had been hired in December. The work which had previously been performed by the grievors was performed primarily by supervisors following the impugned layoffs. Although supervisors had performed such work in the past, they devoted relatively more of their working hours to the performance of such work following the layoffs.

23. It is the respondent's position that the impugned layoffs were effected for legitimate business reasons and that the employees to be laid off were selected on the basis of their employment performance, with seniority being the deciding factor only in the case of Mr. Storr, who was as satisfactory an employee as any of the respondent's other "house call route" deliverymen. As indicated above, the Company experienced a substantial downturn in business in the fall and early winter of 1983. Moreover, the oral and documentary evidence before the Board indicates that the Company did experience some work performance problems with Messrs. Durham and Nirwan in October, November, and December of 1983, and with Mr. Price in December of 1983 and January of 1984, although none of those problems was considered by management to be sufficiently serious to warrant discharge, suspension, or even a written letter of warning.

24. Although there is some evidence before the Board which supports the Company's case, there are also a number of factors and circumstances which, in our view, result in the respondent having failed to discharge the statutory burden of proof which it bears by virtue of section 89(5) of the Act. Although the Toronto Branch had experienced variations in sales levels in previous years, no employees had ever been laid off. Thus, the January 9, 1984 layoffs were the first layoffs which had ever occurred at the Branch. Moreover, they occurred on the first working day after management received information which led them to (correctly) suspect that Branch employees were engaging in union organizational activities. Each of the persons who was laid off had joined the Union at the Union meeting on January 5 in the presence of a number of other employees. One of the persons laid off was Mr. Durham, the main employee organizer who first contacted the Union, arranged for the employees to meet with Mr. O'Donnell, sat with him at the head table at the Union meeting, and served as collector on some of the Union

membership cards. Also laid off at that time were Messrs. Nirwan and Price, two other employees who maintained a high profile at the Union meeting by speaking up to identify themselves as a former union steward and an old friend of Mr. O'Donnell, familiar with union organizing, respectively. Although at least one other person subsequently emerged as one of the Union "leaders", his leadership activities did not take place at that Union meeting, which was held just before the respondent came to suspect that Branch employees were organizing.

25. Having carefully considered all of the evidence and the submissions of the parties, we do not find the explanation given by the respondent's witnesses concerning the timing of the layoff to be credible. Mr. Zakoor's testimony that his "hands on" management style required him to be present at the time of the layoffs is belied by the fact that Bill Smith has authority to hire and terminate employees, and has exercised that authority on several occasions. Indeed, it is clear from the evidence that he hired Mr. Forster on December 9, 1984 without even consulting with Mr. Zakoor. Moreover, Mr. Zakoor was only personally present when one of the four grievors was laid off, and even in that instance it was Mr. Smith rather than Mr. Zakoor who told the employee that he was being laid off. Mr. Smith's unilateral hiring of Mr. Forster also casts considerable doubt on the evidence adduced by the respondent that Mr. Zakoor told Mr. Smith in late October or early November that layoffs were necessary because the Branch had too many employees. Mr. Smith's statements to Mr. Price about job security and "normal" decreases in volume (as described in paragraph 22 of this decision) cast further doubt on that evidence. Having regard to the aforementioned factors relevant to the assessment of credibility, we do not find the testimony of Mr. Kotwicki and Mr. Zakoor to be candid or credible with respect to the timing of and motivation for the impugned layoffs. Credulity is stretched far beyond the breaking point by evidence which suggests that a Company President would instruct the General Manager of a Branch in late October or early November that layoffs would have to be effected at the Branch unless the existing work force could somehow be justified, would let over a month pass without pressing the matter despite the fact that they were in daily communication concerning business matters, would then give the General Manager an ultimatum to "react immediately" to his direction to lay off three to five people, but would then agree in the course of the same conversation to permit the General Manager to delay the layoffs by a further month so that they could be effected after the General Manager's return from vacation, even though that vacation included what had traditionally been the Branch's slowest period of the year.

26. The time of day at which the layoffs occurred on January 9 clearly suggests that the decision to effect the layoffs in question was not made until after January 6 when the Company came to suspect that Branch employees were engaging in union organizational activities. As Mr. Zakoor testified in cross-examination, management "needed [the grievors] that morning" because they "didn't have substitutions scheduled to do their work." Indeed, he virtually conceded in cross-examination that the timing of the layoffs and the determination of the persons to be laid off was not "finalized" until Saturday January 7th.

27. It is also not without significance that when Mr. Smith learned that Mr. Storr would not be reporting for work on January 9 due to a leg injury which required medical attention, Mr. Smith, on the instructions of Mr. Zakoor, directed Mr. Storr to come to the Branch that day after seeing his physician, for the sole purpose of laying him off. When asked to explain the reason for this course of action, Mr. Zakoor told the Board, "[There was] no particular reason. We'd made a decision to lay the people off on Monday. That was Monday." We do not find that explanation to be credible. Under the circumstances, it is reasonable to infer that the true reason for the Company's great haste was to have Mr. Storr on indefinite layoff for

the purpose of a certification application which might be filed on or after that Monday as a result of the employees' suspected union organizational activities.

28. The form and content of Exhibits #6 and #7, and the unsatisfactory evidence of Mr. Kotwicki and Mr. Zakoor concerning the preparation of those memos, cast further doubt on the credibility of those two key management witnesses. The highly self-serving wording of those memos strongly suggests that they may have been prepared in contemplation of these proceedings. The reasonableness of drawing that inference is fortified by the evasive manner in which Mr. Zakoor responded in cross-examination to questions put to him concerning the preparation of Exhibit #7 which, although substantially similar in form to Exhibit #6, does not include the initials of the person who typed it. Mr. Zakoor told the Board in an unconvincing manner that Exhibit #7 could have been typed by any one of five (unnamed) employees at the Toronto Branch, and also indicated that he wanted to "leave it open that he might have dictated it over the phone to a secretary in Windsor". He was also unable to provide any explanation concerning the omission of the typist's initials, in the face of what he conceded to be the Company's normal secretarial practice of having such initials included on memos and other correspondence. Mr. Smith's assertion that he "didn't know the exact layoff date" before the aforementioned meeting on Saturday January 7 casts further doubt on the Company's evidence concerning the time at which those memos were prepared and the reliability of their contents for, if as asserted by Messrs. Zakoor and Kotwicki, a decision to lay off four employees on January 9, 1984 had been made at the time indicated in those memos, Mr. Zakoor would surely have shared that information with Mr. Smith, the Assistant Manager who would be in charge of the Branch during Mr. Zakoor's absence. In this regard, we note that Mr. Smith's evidence concerning the number of persons to be laid off was also unsatisfactory. He initially testified that he "was informed that four people were going to be laid off". However, he contradicted himself shortly thereafter when he was asked, "Were you told how many [were to be laid off]?", and responded, "There was no definite number".

29. Having regard to all of the circumstances, we do not believe that it is a mere coincidence that the impugned layoffs occurred on the first business day following the day on which management came to suspect that Branch employees were engaging in union organizational activities. The depth of the Company's concern about such activities is apparent from the fact that upon receiving the information, Mr. Zakoor cut his vacation short, changed his return flight, and returned immediately to the Branch. Assistant Manager Bill Smith brought at least one employee to the Company boardroom to question him about the employees' activities. A top level management meeting was held at the Branch on Friday January 6, and a further meeting of local management was held on the following day, at which the timing of the layoff and the selection of the persons to be laid off were "finalized" during the course of a meeting at which the possibility that the employees were involved in union organizing activities was the major topic of discussion. All of these factors, combined with what we have found to be a lack of candour on the part of the respondent's principal witnesses, have led us to conclude that the respondent has not discharged its section 89(5) burden of proving that it did not act contrary to the Act in respect of the impugned layoffs. In particular, we are not satisfied that the decision to lay off the grievors was not at least partially motivated by anti-union animus.

30. For the foregoing reasons, the Board finds that the respondent contravened sections 64 and 66 of the Act by laying off the four grievors on January 9, 1984. To remedy that contravention of the Act, the Board will direct the respondent to reinstate Messrs. Durham, Nirwan, and Price, with compensation for all lost wages and other benefits, with interest.

Reinstatement of Mr. Storr will not be directed as he was recalled on April 4, 1984 but declined to return to work for the Company (on the ground that he had secured other employment). However, he is entitled to be compensated for wage and benefit losses (with interest) from the date he was laid off contrary to the Act, to the date on which he rejected the Company's offer of recall (with an appropriate deduction for remuneration received from alternate employment during that period).

31. During his reply argument, counsel for the respondent submitted that if the Board found a violation of the Act in respect of the layoffs, it should award compensation only to Mr. Price and not to any of the other grievors, since Mr. Price was the only grievor who testified in these proceedings and was "exposed to cross-examination on the merits". Counsel based this request upon certain arbitral jurisprudence which indicates that if the parties wish a grievance arbitrator to deal only with the question of liability and retain jurisdiction to hold a further hearing for the purpose of quantifying damages, counsel must specifically make such request during the hearing on the merits, and obtain the other party's agreement to such procedure. However, that approach has not met with universal acceptance by arbitrators. Moreover, whatever the situation may be in the context of arbitration proceedings, this Board, as master of its own procedure with express statutory authority under section 102(13) of the Act to "determine its own practice and procedure", has an established practice of affording the parties an opportunity to agree upon the amount to be paid in cases in which the Board awards compensation. That longstanding practice, which is well known and accepted by members of the labour relations community, reduces the length and cost of Board proceedings. If a complaint is dismissed by the Board, no question of quantum arises. Thus, any evidence adduced concerning that issue would come to naught. Moreover, it has been the Board's experience that the parties are able to reach agreement on quantum of compensation in the vast majority of cases in which compensation is ordered to be paid. Thus, the Board's practice in this regard minimizes the cost and length of Board proceedings to the benefit of the parties who appear before the Board and the taxpayers who finance the operation of the Board. This highly desirable practice does not depend upon the consent of the parties or a request by counsel. It is a practice which the Board has adopted on its own motion in the interest of efficient and effective performance of its duties and responsibilities under the Act, as an ordinary incident of the Board's power under section 102(13) to control its own processes. Moreover, no express retention of jurisdiction is necessary in such cases, since section 106(1) expressly empowers the Board to at any time reconsider any decision, order, direction, declaration, or ruling made by it, and vary or revoke any such decision, order, direction, declaration, or ruling. This practice results in no prejudice whatever to a party, such as the present respondent, which has breached the Act, for if it is of the view that the minimum amount of compensation which the complainant or grievor is prepared to accept is not justified, it may insist upon the complainant or grievor returning to the Board for quantification of the award. In this regard, we further note that there is no obligation on a complainant or grievor to testify during the hearing of the merits of a section 89 complaint to which section 89(5) applies. Indeed, the Board is called upon from time to time to deal with cases of mass layoffs in which the calling of each individual grievor would result in unduly protracted proceedings and much unnecessary duplication of evidence. Similarly, in the present case, it was unnecessary for Union counsel to call Messrs. Durham, Nirwan, and Storr since evidence concerning pertinent facts such as their Union activities had already been placed before the Board through the testimony of other witnesses and the membership cards filed with the Board by the Union. We would further note that respondent's counsel gave no indication, prior to raising this matter in his reply argument, that he wished the Board to depart from its normal practice of severing the issue of quantum from the merits of the complaint. Indeed, his failure to ask Mr. Price any questions pertaining to quantum in

his cross-examination of that witness could only serve to implicitly convey to Union counsel that he was satisfied to have that issue dealt with at a later stage in the proceedings (if necessary). Under the circumstances, it would be unfair and inappropriate for the Board to depart from its usual, well-established practice on the basis of a request raised by respondent's counsel for the first time during his reply argument.

32. For the foregoing reasons, we find there to be no merit in Company counsel's submission that compensation should be awarded only to Mr. Price in the circumstances of this case.

33. Where the Board finds that a party has committed an unfair labour practice, it will generally direct that party to post a notice in conspicuous places in the work place, to attempt to remedy the adverse psychological impact of the contravention of the Act (see, for example, *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). Therefore, in accordance with the Board's usual practice in such matters, the respondent will be directed to post a notice to its employees in order to remedy the chilling effect which the respondent's illegal conduct might otherwise have on those employees in the exercise of their rights under the *Labour Relations Act*. However, we are not satisfied that any of the other remedial relief requested by the complainant is necessary or appropriate in the circumstances of this case. In this regard, we note that a number of allegations of improper or irregular conduct by the respondent which were set forth in the complaint and the letters of particulars filed by counsel for the complainant have not been established on the evidence adduced before us.

34. Having regard to our finding that each of the grievors was laid off on January 9, 1984 in violation of the Act, and having regard to all the other evidence before us, we find that there were 25 employees in the bargaining unit on the date of the certification application (File No. 2311-83-R). The Union has filed valid membership evidence in respect of 18 of those 25 employees. The objectors have filed with the Board in timely fashion a statement of desire signed by 11 employees of the respondent, four of whom also signed membership cards. The Board generally takes such statements of desire into account in deciding whether to exercise its discretion under section 7(2) of the Act to order a representation vote notwithstanding that more than fifty-five per cent of the employees in the bargaining unit are "members" within the meaning of section 1(1)(1) of the Act. In this case, however, even if the statement of desire filed by the objectors is entirely voluntary, the Union will still have the unequivocal support of more than fifty-five per cent of the employees in the bargaining unit. Accordingly, it is unnecessary for the Board to rule on the voluntariness of that statement of desire in the circumstances of the present case.

35. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on January 18, 1984, the terminal date fixed for this application, and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

36. Since there is nothing before the Board which would prompt us to exercise our discretion under section 7(2) of the Act to direct that a representation vote be taken notwithstanding the fact that more than fifty-five per cent of the employees in the bargaining unit are members of the Union, a certificate will issue to the applicant for the bargaining unit described in the first paragraph of this decision.

37. For the foregoing reasons, the Board, in the exercise of its remedial discretion under section 89(4) of the *Labour Relations Act*, hereby orders that the respondent Holiday Juice Ltd.:

- (1) cease and desist from breaching sections 64 and 66 of the *Labour Relations Act*;
- (2) reinstate Scott Durham, Ajmer Nirwan, and Richard Price forthwith, and compensate them for all lost wages and benefits sustained through the respondent's violation of the Act;
- (3) compensate Barry Storr for all lost wages and benefits sustained through the respondent's violation of the Act from January 9, 1984 to April 4, 1984, inclusive;
- (4) pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13, dated September 8, 1980; and
- (5) post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of Holiday Juice Ltd., in conspicuous places on its Toronto Branch premises where they are likely to come to the attention of bargaining unit employees, and keep the notice posted for sixty consecutive working days. Reasonable steps shall be taken by management to ensure that the said notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given by Holiday Juice Ltd. to a representative of the Union so that it can satisfy itself that this posting requirement is being complied with.

38. The Board will remain seized of this matter in the event that a dispute arises concerning the interpretation, implementation, or quantification of the Board's order.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY LAYING OFF SCOTT DURHAM, AJMER NIRWAN, RICHARD PRICE, AND BARRY STORR ON JANUARY 9, 1984.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A
TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT LAY OFF OR OTHERWISE DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE HE OR SHE HAS SELECTED MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AS HIS OR HER BARGAINING AGENT, OR HAS EXERCISED ANY OF HIS OR HER OTHER RIGHTS UNDER THE ACT.

WE WILL RECALL SCOTT DURHAM, AJMER NIRWAN, AND RICHARD PRICE FORTHWITH.

WE WILL PAY TO SCOTT DURHAM, AJMER NIRWAN, RICHARD PRICE, AND BARRY STORR ALL WAGES AND OTHER BENEFITS LOST BY THEM (PLUS INTEREST) AS A RESULT OF THE VIOLATION OF THE ACT FOUND BY THE BOARD.

HOLIDAY JUICE LTD.
PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0373-84-OH Bob Nault, Complainant, v. Inco Metals, Respondent

Health and Safety — Remedies — Complainant complaining to foreman about unsafe procedures in blasting of ore-pass — Foreman creating impression that complainant “troublemaker” for making complaint and seeking disciplinary action — Foreman’s attitude generating hostility against complainant from peers — Violation found — Board satisfied that upper-management safety conscious and not party to wrong — Leaving employer and union to agree on terms and wording of notice to employees

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *Norm Carriere, Bob Nault and Dan Sweezy for the applicant; Janice Baker and C. H. Meaden for the respondent.*

DECISION OF THE BOARD; October 12, 1984

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*, alleging that the complainant, Bob Nault, has been dealt with by the respondent contrary to the provisions of section 24(1) of that Act. Section 24(1) provides:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

2. The complainant is an experienced scoop operator and on August 4, 1983 was working at the 1,250 level of the respondent’s South Mine. That is an area of the mine where blasting of the ore-pass is not uncommon. The procedure in setting a blast is to telephone down to the level below, giving notice of that so that guards can be posted to seal off the area close to the ore-pass. On that day no such warning had come, and Mr. Nault was working at the mouth of the ore-pass when a blast at the level above (1,000 feet) was set off. Mr. Nault reported the incident to his foreman, noting that no guards had been posted and that he had observed a tongue of flame and an unusual amount of concussion. The foreman, Mr. Riskie, responded that he could not understand where the flame would have come from, but that he would investigate the reason why no guards had been posted. Mr. Riskie gave Mr. Nault the standard Total Accident Control Report form for him to fill out and while Mr. Nault was away doing so, Mr. Riskie phoned the Leader in charge of the blast on level 1,000 feet, Mr. Hebert, and asked him why he had not telephoned level 1,250 to warn of the blast and secure the posting of guards. Mr. Hebert responded that he had been in a hurry to clear the ore-pass and had forgotten to telephone. When Mr. Nault returned with the completed report form Mr. Riskie

accepted it and made no further comment about the incident. Mr. Riskie then arranged to have Mr. Hebert come to his office at the end of the shift, where he questioned Mr. Hebert further about the details of the blast and confirmed the admission which Mr. Hebert had made to him earlier.

3. The company acknowledges that the failure to post guards on a blast is regarded as an extremely serious offence, resulting virtually automatically in being sent home with a fourth step warning. Mr. Riskie assured the Board in his testimony that he himself, on the basis of his personal experience, regarded such omissions as extremely serious. The problem is that that view is not reflected or easily discerned from the way that Mr. Riskie appeared to respond to the situation at the time. On the morning after the incident, for example, Mr. Nault ran into Mr. Riskie in the equipment area and asked Mr. Riskie what he was going to do about the prior day's incident. Mr. Riskie responded that he "would be investigating further, and probably taking action, since you complained." Mr. Nault was upset by the tenor of that remark and retorted: "So now you're putting it all on me, Riskie — I won't forget that". Mr. Riskie testified that he decided at that point to "back off", and made no further comment to Mr. Nault. Mr. Riskie says he later attended at the 1,000 foot level where all of the crew involved in the blasting operation the day before were present and gave them a "severe reprimand". The Board heard no other evidence in that regard. At lunch time on that day, however, Mr. Riskie became involved in a further discussion of the blasting incident with that crew, and the leader, Mr. Hebert, asked Mr. Riskie, "Who's pushing this thing?". Mr. Riskie testified that he took that to mean who was pushing for discipline to be imposed as a result of the incident and Mr. Riskie simply replied: "Bob Nault". Mr. Hebert later in the conversation asked Mr. Riskie why it was that Bob Nault was pushing the thing, and Mr. Riskie responded simply: "I don't know". This account by Mr. Riskie of his conversation with the crew is consistent enough with the account testified to by one of the men present, Mr. Boisvert, that we accept Mr. Boisvert's evidence as well in that regard. Mr. Boisvert testified that Mr. Riskie told the crew that if Bob Nault did not stop pushing the thing, someone would be disciplined.

4. It appears from the evidence that Mr. Hebert was not in fact disciplined any further for the incident. Mr. Riskie testified that he discussed the incident with the General Foreman but made no recommendation either way, in accordance, he added, with his usual practice involving safety matters. Mr. Riskie stated that he was unaware of the reasons why Mr. Hebert was not disciplined further. The Report form completed by Mr. Nault has a place for the "supervisor's signature" and "corrective action taken and or recommendation", and Mr. Riskie was asked in cross-examination why those portions of the Form were left blank. Mr. Riskie responded that at the point when he received the form from Mr. Nault, he had not yet completed his investigation and that he filled out another form when he had. The second form was not submitted to the Board in evidence. While it is not clear what action Mr. Riskie himself took with respect to this matter, it should be noted that Mr. Maciborka, the General Foreman responsible for these levels, personally conducted a series of blast tests as a follow-up to Mr. Nault's report of the unusual concussion and flame. Mr. Maciborka also issued a notice re-affirming the company's safety procedure on carrying out blasts of this kind.

5. Unfortunately, the impression created by Mr. Riskie that management viewed Mr. Nault as the "troublemaker" with respect to the August 4th incident would have been reinforced in the eyes of other employees by the fact that four days later, on Monday August 8th, Mr. Nault was stopped by Mr. Riskie as he was about to enter the "cage" to descend to his station and was re-assigned on the spot to level 2,250, an area under entirely different supervision. The company's evidence is that a Mr. Leduc, whom Mr. Nault had been replacing

while the former was ill, arrived unannounced that morning with a doctor's certificate indicating he was ready to work. The company further gave evidence that as of the previous May 30th, the manning of levels 1,250 and 1,000 had been rationalized and both Mr. Nault and Mr. Boisvert, who was also a scoop operator and was junior to Mr. Nault, had become surplus to the regular crew. Both operators were, however, engaged at that time in backfilling a stope, and were allowed to continue that job, Mr. Nault at level 1,250 and Mr. Boisvert at 1,000, until about the middle of June when the work was completed. At that point, however, Mr. Leduc, the regular scoop-operator at level 1,250, went off sick, and Mr. Nault was able to replace him. Mr. Boisvert at the same time was kept busy performing miscellaneous non-operator tasks at level 1,000. When Mr. Leduc returned on August 8th, Mr. Riskie testified that he found himself with two scoop-operators at level 1,250, and only one scoop. Mr. Riskie went to the general foreman Mr. Maciborka and explained his problem. The evidence of the company is that such short-term redundancies are normally dealt with on the basis of seniority, although the senior employee might first be offered the option of whether he wishes to be the one to move. Mr. Maciborka testified that that morning a temporary job vacancy for a scoop-operator at level 2,250 had been posted on the bulletin board, and, after checking with the general foreman at that level, instructed Mr. Riskie to send down Mr. Nault, the junior man. Mr. Riskie testified that he never gave any thought to moving Mr. Boisvert, who is junior to Mr. Nault, because Mr. Boisvert was working on the 1,000 foot level, which, although also now under Mr. Riskie's supervision, formed part of a different "beat". Mr. Boisvert was himself sent down to the 1,700 foot level at the end of that month.

6. We deal firstly with the question of the statements made by Mr. Riskie to Mr. Nault and the employees involved in the blasting incident. Mr. Riskie explained his statement to Mr. Nault (that Mr. Riskie would investigate the matter and discipline might follow "since you complained") on the basis that Mr. Riskie had not himself been aware of the blast, and would have had nothing to investigate had Mr. Nault not put in his report. Given the fact, however, that Mr. Riskie at that point had already satisfied himself from talking to the individual responsible for the blast that a serious error in procedure had occurred, the Board finds Mr. Riskie's choice of response to Mr. Nault puzzling at best. Mr. Riskie allowed in his testimony that his words to Mr. Nault might have been "misconstrued" to indicate that management itself did not find the incident worthy of following up. But Mr. Nault's interpretation of the tenor of Mr. Riskie's remark was apparent from Mr. Nault's angry response; yet Mr. Riskie made no effort to suggest to Mr. Nault that he had misunderstood him. The impression one is left with is that Mr. Riskie in fact viewed Mr. Nault as a "trouble-maker" in this incident, and that impression was re-affirmed in the conversations which Mr. Riskie subsequently had with the other employees involved in the incident. In none of the specific conversations related did Mr. Riskie give an indication that management itself was interested in following up the incident, or that they considered it to be a serious violation of the safety procedures. Mr. Riskie appears to have been more than content to convey the impression that the complaints of Mr. Nault were the sole source of the other employees' difficulties, and possible discipline, and to leave Mr. Nault standing alone to deal with the pressure from his peers that that would inevitably create.

7. The evidence is clear that at the time of all of these conversations, Mr. Riskie knew he was dealing with an *admitted* safety violation, and one of such a magnitude as could easily have caused the complainant serious injury or, as Mr. Riskie himself testified to, loss of life. In those circumstances, we find the handling of the situation by the foreman Mr. Riskie, in generating peer pressure against Mr. Nault for pursuing his complaint, to have been not only irresponsible, but a violation of the *Occupational Health and Safety Act* as well.

8. While a violation of this type might be viewed as minor on its face, the Board has to be concerned with any misconduct of a nature which tends to undermine one of the major premises upon which compliance with the Act is based. The *Occupational Health and Safety Act* clearly makes the good-faith reporting of safety violations not just the concern but the responsibility of every party present in the workplace. Apart from the mandatory requirements of health and safety representatives and joint health and safety committees, the Act spells out in detail the specific responsibilities of each of "owners", "employees", "constructors", "supervisors", "workers", and "suppliers". With respect to "workers" the Act requires that:

17.-(1) A worker shall,

- (a) work in compliance with the provisions of this Act and the regulations;
- (b) use or wear the equipment, protective devices or clothing that his employer requires to be used or worn;
- (c) report to his employer or supervisor the absence of or defect in any equipment or protective device of which he is aware and which may endanger himself or another worker;
- (d) report to his employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he knows; and
- (e) where so prescribed, have, at the expense of the employer, such medical examinations, tests or x-rays, at such time or times and at such place or places as prescribed.

And (2) No worker shall,

- (a) remove or make ineffective any protective device required by the regulations or by his employer, without providing an adequate temporary protective device and when the need for removing or making ineffective the protective device has ceased, the protective device shall be replaced immediately;
- (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker; or
- (c) engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.

It would be simple to trivialize the remarks made by Mr. Riskie by viewing them simply as the embarrassment of a single individual in a case where no accident or injury occurred. But what was at issue was an omission acknowledged by all parties to be patently dangerous, and we have to be concerned with the effect that portraying Mr. Nault as a "trouble-maker" would have upon the making of valid complaints in the future, or the following-up of the complaint already made. A point is reached where the effect of certain conduct is so readily foreseeable that an individual must be presumed to have intended its consequences, and the Board finds

that Mr. Riskie, acting as an agent of the respondent employer, sought to intimidate or coerce Mr. Nault because he was acting in compliance with the Act and seeking its enforcement, in order to deter him from any such further action.

9. We do not, however, find the apparent attitude of the foreman Mr. Riskie, in this safety incident pertaining to Mr. Nault, reflective of the views of any of the higher levels of management. Mr. Maciborka, the General Foreman, clearly took Mr. Nault's complaint seriously, and both re-issued a reminder of the proper procedures to be followed, without exception, in such blasting operations, and personally tested to see whether abnormal conditions were present in the ore-pass itself. It was Mr. Maciborka who made the decision to select Mr. Nault for transfer as the "junior" scoop operator on August 8th, and, while the timing was unfortunate, from the point of view of enhancement of the objectives of the *Occupational Health and Safety Act*, we accept that the redundancy situation did in fact arise as a result of circumstances wholly out of the control of the employer. Mr. Nault had only been retained as a scoop operator at the 1,250-foot level because of the illness of the more senior Mr. Leduc, and the Board does not find it surprising or inconsistent with company practice for the company to allow Mr. Leduc to reclaim his job upon his return. Neither do we find that this isolated redundancy caused by the return of Mr. Leduc would give rise to the kind of wholesale shuffling contemplated by the "Force Adjustment Procedures" tendered in evidence by the complainant. Nor, finally, do we find it unworthy of belief, in the light of the limited evidence of the company's practice of dealing narrowly with such isolated redundancies, that the seniority of scoop operators at the level above, which historically had formed part of a different foreman's "beat", would not have been given consideration as well. From a potential remedial point of view, we might note that the junior man at level 1000, Mr. Boisvert, came to be re-assigned to a lower level of the mine within three weeks of the incident as well. On all of the evidence, we cannot conclude that the action of Mr. Maciborka, in selecting the junior scoop operator at the 1,250-foot level, Mr. Nault, for transfer to the temporary vacancy at level 2,250, was "tainted" in any way by improper considerations, and hence in violation of the *Occupational Health and Safety Act*.

10. The *perception* created by the sequence of Mr. Riskie's handling of the situation on August 5th, in violation of the Act, and Mr. Nault's precipitous re-assignment on August 8th, continues to trouble us, however, and makes the posting of an adequate Notice all the more significant in this case. But there is, in this case, nothing to suggest to us that the more senior levels of management have anything less than a proper regard for the objectives and requirements of the *Occupational Health and Safety Act*, nor would seek in any way to discourage employees from reporting what they have reason to believe are violations of that Act. We accordingly see no reason at this point why it cannot be left to management and the trade union representing Mr. Nault and his fellow employees to agree on the terms and posting of a Notice which will confirm such sentiments to all of the employees in the South Mine, in order that the isolated events occurring with respect to Mr. Nault not be misunderstood. The Board will remain seized of this matter, and should we be advised that the employer and the trade union have been unable to reach an accommodation on the wording and terms of posting of such a Notice by October 19, 1984, the Board will issue a direction in the more standard form of detail.

11. The Board accordingly:

- (1) declares that the respondent has violated section 24(1) of the *Occupational Health and Safety Act*; and

- (2) directs the respondent to sign and post a Notice in accordance with the terms of paragraph 10 of this decision.

The Board remains seized of this matter in accordance with the terms of that paragraph.

0817-84-R Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Tryverse Products Ltd., c.o.b., as **Lilo Products**, Respondent, v. Group of Employees, Objectors

Certification — Petition — Practice and Procedure — Petition left at Board's offices after office hours on terminal date — No Board staff present to accept delivery — Whether satisfying regulation requiring that petition be "received by" Board not later than terminal date

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. H. Wightman and E. G. Theobald.

APPEARANCES: *A. L. Lefort, Eric Del Junco and Ken Petryshen for the applicant; Louisa Davie and Leonard Maclin for the respondent; Karen E. McGuire, Donald J. Perry and Andrew K. Martin for the objectors.*

DECISION OF THE BOARD; October 15, 1984

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2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the City of Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 5, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. In connection with this application, the Board received two handwritten statements of desire. One, dated July 5, 1984 and containing three signatures, was posted to the Board

by registered mail on the terminal date. There is no question that it is properly before us. The second statement of desire is also dated July 5, 1984. In the circumstances set out below, there is a dispute between the parties as to whether the second statement is properly before us. The Board heard argument on that issue at its hearing in this matter, reserved its decision, and heard the parties' evidence and submissions with respect to the origination and circulation of both statements of desire.

7. The circumstances of filing of the second statement of desire are not in dispute. Andrew Martin initiated the first statement of desire on the terminal date, July 5, 1984. By 5:30 p.m. he had three signatures on it. He then went to the post office, and posted it to the Board by registered mail. He and a fellow signatory then met at a restaurant and, shortly thereafter, learned that another employee, whose signature they had earlier sought and failed to obtain, was now prepared to sign. They attended at this employee's home, where the second statement of desire was written out and signed. At this point in the evening, the post office in Hamilton was closed. Martin and his colleague determined to drive to Toronto and deliver the second statement of desire by hand to the Board's offices at 400 University Avenue. They arrived at 9:15 p.m., entered the lobby of the building at 400 University Avenue and spoke to the security guard on duty there. She took them to the fourth floor, where the Board's administrative offices are located. They put the envelope containing the second statement of desire on the Board's reception desk in the elevator lobby of that floor. The security guard then wrote out and gave Mr. Martin an acknowledgement of the arrival (to use a neutral term) of the envelope in question. At the time of this attendance at the Board's premises, no one was on duty at the reception desk and it was not apparent that anyone was present in the Board's offices. The security guard in question is not an employee of the Ontario Labour Relations Board, and there is no evidence that any Board employee saw or handled the envelope or its contents at any time on the terminal date. The foregoing facts were all agreed to by counsel for all parties, without the necessity of formal proof.

8. Subsections 73 (1) and 75 (1) of the Board's Rules of Procedure provide:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who filed the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

75.-(1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

(a) at the time it is received by the Board; or

- (b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario, M7A 1V4, at the time it is mailed.

The effect of these rules on the filing of statements of desire is expressly set out in the Notice to Employees of Application for Certification and of Hearing (Form 6) which was posted, as required, in the respondent's premises and read by Mr. Martin before commencing his petition activities. Paragraphs 5 and 6 of that notice read as follows:

5. The statement of desire must be,

- (a) received by the Board **not later** than the terminal date shown in paragraph 3; or
- (b) if it is mailed by **registered mail** addressed to the Board at its office, 400 University Avenue, Toronto, Ontario, M7A 1V4, mailed **not later** than the terminal date shown in paragraph 3.

6. A statement of desire that does not comply with paragraph 4 and 5 will not be accepted by the Board .

9. The threshold question is whether the physical delivery of the statement of desire to the Board's premises, in the circumstances outlined, results in the statement of desire having been "received by the Board" at the time of delivery to the Board's offices, in the absence of any evidence that it came into the hands of any person employed by the Board at any time on that day. In other words, can the words "received by" be interpreted as meaning "delivered to", or must they be interpreted as meaning "knowingly accepted by". The latter interpretation would be appropriate in a context from which it was apparent that receipt triggered some immediate obligation on the part of the recipient: see *Alaska Trainship Corp. v. Canadian Merchant Service Guild*, (1974) 41 D.L.R. (3d) 116 (B.C.S.C.). When "receipt" results in criminal liability, as with receipt of stolen goods, then the requirement of knowing acceptance springs as much from the criminal law concept that *mens rea* should be a necessary element in the definition of criminal behaviour as it does from consideration of the meaning of the word "receive".

10. Nothing in Form 6 suggests that a deadline for filing of documents is being specified because the Board is obliged to take some step immediately upon receipt. This becomes obvious from the fact that the alternative to arranging that a document be "received by" the Board is posting by registered mail. It would be apparent to anyone reading Form 6 or Rule 75 that if a document is filed by registered mail, the deemed filing date is not a date on which the Board can expect or be expected to do anything with the document filed. Indeed, the reader could fairly predict that a document left at the Board's premises after office hours would come to the attention of Board employees the following morning — earlier than a document posted by registered mail on the same day. The reader would likely conclude that the registered mail alternative would not be offered if the object of the rule were to ensure that a document was actually in the hands of an employee of the Board before midnight on the terminal date. Nothing in the notice expressly requires that a document be received by a particular time of day or by a particular (or any) officer or employee of the Board. It seems unlikely that persons to whom the Board's notice is addressed would anticipate that paragraph 5(a) cannot be satisfied unless the bearer of a document can arrange for it to be physically handled on or before the terminal

date by an appropriate Board employee, whomever that might be. We believe that reasonable expectations that employees would have after reading the Board's notice would be defeated if the "accepted by" interpretation were adopted. Nothing in the Board's other rules or procedures compels or prefers the "accepted by" approach.

11. If Rule 75(1)(a) were interpreted so as to require some positive act on the Board's behalf in order for a document to be "received by" it, a number of questions would arise. The first would be: who has the power to "accept" filings on behalf of the Board? On whom has this power to accept been conferred or imposed?: see section 102(15) of the Act. It is not at all apparent that such a power has been conferred on Board employees generally. The next question would be: how is acceptance to be proved by the party filing the document? The Board's date stamp is not conclusive irrebutable evidence of the date of receipt. Documents delivered to the Board are date stamped for internal administrative purposes. The date affixed is normally the date the document is delivered, because most documents delivered to the Board arrive during the hours of employment of the Board personnel responsible for processing and the date stamping incoming mail. While the date stamp is an important aid to the Board and its administrative staff in the processing of files, it has no official status under the Board's rules. A document "accepted by" a Board employee after the Board's mailroom staff left work would not normally be date stamped until the following day; no Board rule requires the after-hours employee recipient of mail to seek out and operate the mailroom employees' date stamping machine. Even if "received by" were interpreted to mean "accepted by", the Board would have to be prepared to act on evidence that the date of receipt has not been accurately recorded by the Board's date stamp, just as the Board is prepared to act on evidence that postal registration records are inaccurate: see *Hoffman Concrete Products Ltd.* [1976] OLRB Rep. Feb. 35. Short of demanding to follow the document to the mailroom or insisting on the Registrar's handwritten receipt, how could the bearer of documents for filing ensure he has complied with the "accepted by" test and can prove it? The practical answer is that he could not, particularly in view of section 109 of the Act, unless the Board and the parties who deal with it were all to adopt a far more formal approach to day-to-day dealings.

12. The Board's rules, procedures and notices could, and perhaps should, be amended to clarify rule 75(1)(a). As the rule reads presently, however, we conclude that a document delivered to and left at or in the Board's administrative offices is a document received by the Board at the time of delivery, no matter who was or was not present in those offices at that time. It is conceded that the petitioners parted with the envelope and its contents at the Board's reception desk at 9:15 p.m. on the terminal date. We conclude that the filing of the second petition document was timely.

13. On the basis of the evidence heard by the Board with respect to the origination and circulation of the statements of desire, the applicant trade union argues that we should not treat either document as voluntary. Counsel for the applicant concedes there is no evidence of actual management involvement in the origination or circulation of either statements of desire. He points, however, to the fact that the respondent, after learning of the existence of the union's organizing campaign, commenced using written disciplinary warning letters. Previously, warnings had always been given orally. We heard evidence of the respondent's manager, and are satisfied, that this change in practice was a result of his belief that he should be cautious in speaking to his employees directly, and careful to record the nature of his communications with them during the sensitive period of an organizing campaign. Counsel for the applicant does not challenge this motivation, but observes that a change of this sort coincident, and obviously as a result of, the appearance of a trade union would convey a message, intended

or not, that things will change if the employer has to deal with a union. Counsel argues that the effect of this on the employees would be such as to impair their ability to voluntarily express their wishes.

14. Mr. Martin and Mr. Perry, both employees in the small unit in question, testified that it was not the introduction of the written warning system which prompted them to sign the statement of desire. Their evidence is that after notice of a previous certification application by the same applicant was posted early June, union supporters became arrogant and emphasized the changes in work practices which unionization would and could effect in the work place. These other employees began asserting control over methods of performing work, behavior to which the manager had not reacted positively and which additionally, had had an adverse impact on Mr. Martin's workload. The new written warning system seemed to these objectors not to cool the manifestations of other employees' pro-union ardor; if anything, they inflamed them. Their petition was a reaction to the behaviour of these other employees; in common parlance, the petitioners were "turned off". The evidence of these two petitioners was not seriously challenged. While we cannot assume that the motivation of the other signatories was the same as that of the petitioners, we are satisfied on all the evidence that, viewed on an objective basis, the employer's behaviour did not impair its employees freedom of expression to the point at which their signatures on a statement of desire become involuntary, as that term is understood in the Board's jurisprudence. We are satisfied that both statements of desire are voluntary. The presence on these statements of desire of signatures of persons who have also signed membership applications puts in doubt the continued desire of those persons for representation by the applicant in collective bargaining. The number of membership applications on which doubt has not been so cast would alone be insufficient to entitle the applicant to certification without a vote. In those circumstances, and notwithstanding that more than fifty-five per cent of the employees in the bargaining unit on the application date were members of the applicant on the terminal date, the Board will ordinarily exercise its discretion under section 7(2) to order a representation vote. We see no reason not to do so in this case.

15. Accordingly, a representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on July 13, 1984, who do not voluntarily terminate their employment or who are not discharged for cause between that date and the date the vote is taken will be eligible to vote.

16. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

17. The matter is referred to the Registrar.

0836-84-R Energy and Chemical Workers Union, Applicant, v. **Maple Leaf Mills Limited**, Master Feeds Division, Respondent, v. Teamsters, Local Union 879, Intervener

Membership Evidence — Practice and Procedure — Combination application not signed by collector — Collector's name not appearing on application or receipt portions — Not substantive defect and capable of curing by viva voce evidence — Defects not disclosed in form 9 declaration — Board entertaining evidence to show that proper inquiries made by declarant

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Daniel Ublansky for the applicant; Robert A. Madeley for the respondent; Ken Petryshen and Ray Rock for the intervener.*

DECISION OF THE BOARD; October 18, 1984

1. This is an application for certification, in which the applicant requested that a pre-hearing representation vote be taken. In a decision dated July 16, 1984, (reported at [1984] OLRB Rep. July 986) the Board directed that a pre-hearing representation vote be taken. In view of apparent defects in the membership evidence submitted with the application, the Board also directed that the ballot box be sealed pending further Board order.

2. The difficulty with the membership evidence originally submitted with the application is noted in the following extracts from the Board's decision of July 16, 1984:

1. . . . The application was filed by registered mail on June 22, 1984. It was accompanied by what purported to be documentary evidence of membership of 28 persons claimed to be employees of the respondent. The membership evidence was accompanied by a Form 9 Declaration of David F. Pretty, a National Representative of the applicant. Paragraph three of that document reads as follows:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that *the persons whose names appear on the receipts* or other acknowledgments of the payment on account of dues or initiation fees *are the persons who actually collected the moneys paid* on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, **EXCEPT IN THE FOLLOWING INSTANCES:**

(emphasis added)

No exceptions are noted on the form. The membership evidence consisted of combination applications for membership and receipts which were, on

their face, regular in all aspects but one: none of the receipts have been countersigned by the collector of the card, and the name of the collector of the \$5.00 payment referred to therein is nowhere shown on any of the cards.

2. By letter dated June 29, 1984, Mr. Pretty wrote to the Registrar of this Board, saying:

Inadvertently, 28 of the previously filed membership cards, had not been countersigned by the witness as having received the initiation fee payment. Proper receipts were however provided to the applicants and the monies were paid and are being held by myself.

Resultantly we have repeated the process and enclose herewith 22 properly countersigned applications for membership to supplement or substitute for the earlier filing.

The Board then noted that when a pre-hearing representation vote is requested, the relevant time for ascertaining trade union membership is the date of the application, not the later terminal date. The Board also noted that while a pre-hearing representation vote may be directed when the relevant records provide an appearance that not less than thirty-five per cent of the employees in the voting constituency were members of the applicant on the application date, the vote itself will not have any effect, whatever its outcome, unless the Board is "satisfied" that not less than thirty-five per cent of the employees in the appropriate bargaining unit were members of the applicant at the relevant time. The Board acknowledged the possibility that documents sufficient to provide the "appearance" requisite to the directing of a representation vote might not, in the end, be sufficient to "satisfy" the Board that the applicant had the level of membership required in order to give any meaning to that vote. The Board then noted:

5. The Board has considered a number of previous Board decisions, including: *Williams Machines Limited*, [1972] OLRB Rep. Oct. 879, *Leon's Furniture Limited*, [1977] OLRB Rep. Jan. 25, *Emanuel Products Limited*, [1977] OLRB Rep. Feb. 37, *Diplock Durable Floor Co. Ltd.*, [1978] OLRB Rep. July 613. It appears from these authorities that while there is grave doubt that the Board could be "satisfied" under section 9(4) on the basis alone of the material filed with the application, it is at least open to argument that the defects in the evidence can be cured by appropriate *viva voce* evidence. This would necessarily include evidence of the Form 9 Declarant, who would be obliged to explain how he could sign a declaration that "the persons whose names appear on the receipts . . . are the persons who actually collected the moneys paid . . ." where there are no names of collectors on the documentary evidence filed. We conclude that the evidence submitted with the application is qualitatively sufficient to support the appearance required by section 9(2), and that it is a matter for further argument whether the evidence is qualitatively sufficient to satisfy the Board under section 9(4) of the Act.

As noted earlier, the Board then directed that a pre-hearing representation vote be taken and that the ballot box be sealed. A pre-hearing representation vote was so taken; none of the parties

objected to the conduct of the vote. This application was listed for hearing however in order to deal with the matters referred to in the Board's earlier decision.

3. Counsel for the applicant called as witnesses the Form 9 Declarant and the two employees who, between them, had been responsible for collecting all of the "cards" submitted with the application. These cards were in the form of an application for membership and attached receipt or acknowledgement of payment. In every case, the application for membership was duly dated and signed by the applicant. The "receipt" portion was in this form:

\$5.00 Initiation Fee Received by

.....

I confirm payment of the Initiation Fee

.....

(Applicant Member's Signature)

In each case, this receipt portion bears the applicant member's signature in the space provided for it, but nothing appears in the space provided for the signature of the collector. The cards were numbered for the purpose of receiving the testimony of the collectors; the collectors were directed to and did refer to each card only by number, so as to preserve the confidentiality of membership evidence. Each collector identified the cards which he had collected and, with respect to each card, confirmed that he was the person who had received the \$5.00 initiation fee referred to in the card. Each of the collectors testified that the cards and related initiation fees were collected from him by the Form 9 Declarant, David Pretty. Each collector testified that when he handed over the cards and the money to Pretty, Pretty asked him whether he had collected the \$5.00 from, and provided a receipt to, each applicant for membership; each collector said that he had responded to that inquiry in the affirmative.

4. David F. Pretty testified that he had been associated with the applicant trade union for over fifteen years. Although his responsibilities included organizing new units when possible, most of his time was spent in servicing existing bargaining units, and he had not had much exposure to organizing. In this case, however, he did take responsibility for an organizing campaign. He gave blank cards to the employee collectors and instructed them both with respect to the completion of the cards and the requirement that the \$5.00 initiation fee be paid directly by the applicant. Mr. Pretty also testified about his meetings with the collectors, and confirmed their evidence that he had made the appropriate inquiries and, as a result, knew that the collectors had actually collected the amounts referred to in the cards from the persons whose acknowledgments of payment appear on those cards. After gathering the cards from the collectors, Pretty examined each of them to see if the signature corresponded to the printed name, and determined whether there was on each card a signed acknowledgment of payment of the initiation fee. He failed to check for the collector's signature on the receipt portion of the cards. When preparing to submit this application, Pretty was aware that a Form 9 Declaration was required. He candidly acknowledged that he did not examine it in detail, nor did he consider all of its implications. He says it was his understanding that this form was a declaration as to the number of cards the union believed were legitimate and in respect of which the appropriate fee had been collected. When he prepared the application, Pretty says, he merely took out an Application for Certification form and a Form 9, signed both in blank, and handed them to his secretary along with the cards and instructions about filling out the forms. The

secretary completed the forms and put them in the mail later that day. Pretty is not sure whether he saw the completed certification application before it went in the mail; Pretty is sure that he did not see the completed Form 9 before it went in the mail. Subsequent events led the secretary to wonder whether the cards in question had borne collectors' signatures. She examined the photostats she had made of the cards at the time the application was submitted. She saw that the collectors had not signed the cards and drew this to the attention of Mr. Pretty, who then wrote the letter of June 28th referred to in paragraph 2 of this decision.

5. The state of the membership evidence and Form 9 Declaration at the time the application was filed raised two questions. The first was whether membership evidence in the form submitted could be satisfactory when neither the signature nor the name of the collector of the initiation fee was shown on the document. The second question concerned the effect of a trade union official signing a Form 9 Declaration which, in the circumstances, is patently meaningless, if not untrue. After hearing the evidence referred to, there is the further issue whether that evidence changes the result in either of the first two questions.

6. In *Leons Furniture Limited*, [1977] OLRB Rep. Jan. 25, the membership evidence in question was similar in form to the documentation before us: there was no collector's signature. In that case, however, the name of the collector had been printed in the space where the collector's signature would ordinarily be found. The Board reviewed its earlier jurisprudence. It was unable to find a case which addressed the absence of a collector's signature on a combination application and receipt or acknowledgment of payment. While it was clear from the jurisprudence that the Board preferred to see a collector's signature on membership evidence in that form, there was no clear policy statement (as there had been with respect to certificates of membership) that a receipt or other acknowledgment of payment must be signed on behalf of the trade union. In its analysis, the Board treated the collector's signature as an evidentiary safeguard rather than as an essential or constituent element of proof of membership. It took the view that a proper response to the absence of such a safeguard did not require that an application be dismissed, although the defect might well "weigh heavily" against the applicant when all the surrounding circumstances were examined. It is important to note, in considering the decision in *Leons Furniture Limited*, that the Form 9 (then Form 8) Declaration which accompanied the membership evidence under consideration in that case was not made meaningless by the substitution of a printed name for a signature, because a collector's name did still appear on each card.

7. In *Williams Machines Limited*, [1972] OLRB Rep. Oct. 879, the applicant had filed certificates of membership by which the signatory certified that he was a member of the applicant and had paid the \$1.00 initiation fee. No official of the applicant trade union had countersigned these documents, nor did the signature of the collector of the initiation fee appear on any of them. The Board made reference to the language of what now appears as paragraph 3 in Form 9, and to the statutory definition of trade union membership which now appears in clause 1(1)(l) of the *Labour Relations Act*. The Board noted that the documentation submitted did not fit the statutory definition and that "since the name of the collector does not appear on the face of the documentary evidence filed by the applicant, the statement contained in Item 3 of Form 8 submitted by the applicant, if not meaningless, is patently untrue." The Board went on to find that the membership evidence submitted by the applicant was entirely unsatisfactory and would not be accepted as proof of membership in the applicant. The result and analysis in *Williams Machines Limited* was distinguished in *Leons Furniture Limited* on two bases. One was that, on the facts in the *Leons* case, the Form 9 Declaration was not made meaningless. The other was that *Williams* dealt with certificates of membership,

with respect to which there were clear Board policy statements requiring official counter signatures, while *Leons* dealt combination membership application and receipt cards, in respect of which there had been no such policy statements. Focusing just on the effect of absence of the collector's signature, and setting aside for the moment the effect this has on the Form 9 Declaration, we are satisfied that the approach adopted by the Board in *Leons Furniture Limited* is equally applicable here, even though the names of the collectors have not been printed on the cards before us. The absence of the collector's signature is an irregularity which may affect the weight to be given to the documentary evidence, but does not by itself require rejection of the evidence out of hand.

8. Turning to the question of the Form 9 Declaration, we note that the Board has always placed a heavy onus on an applicant trade union to make the inquiries contemplated by the Form 9 Declaration and to fully declare any discrepancies. In *Zehr's Markets Limited*, [1972] OLRB Rep. June 635, the Board noted:

4. There are a number of cases before this Board dealing with Form 8 [now Form 9]. Those cases indicate that the Board has exacted very stringent standards from applicants who submit membership evidence. These stringent requirements are necessary because the membership evidence or records of trade unions relating to membership fall within the secrecy requirements of section 100 [now section 111] of the Labour Relations Act. Other parties to a certification proceeding do not have the opportunity to examine the membership evidence nor in the usual case do the parties have the opportunity to cross-examine witnesses with respect to the membership evidence. It is in those circumstances that the Board approaches its statutory responsibility under section 7 of the Act and accordingly is extremely vigilant in ensuring the propriety of membership evidence. Since the Board in turn must rely on the evidence of membership tendered by the applicant trade union the Board has exacted strict requirements from applicant trade unions with respect to that membership evidence and particularly with the declaration concerning membership documents (Form 8).

5. The Declaration, Form 8, "goes to the very root of the membership evidence submitted by the applicant". *Canadian Union of Operating Engineers v. The Stanley Steel Company Limited v. United Steelworkers of America* [1972] OLRB Rep. 181; and the cases before this Board have indicated that there must be compliance with the requirements of Form 8 and complete disclosure must be made. See e.g., *Stanley Steel Company Limited*, *supra*; *United Steelworkers of America v. National Steel Car Corporation Limited* [1966] OLRB Rep. 738; *Valley Transportation Company Limited* [1963] OLRB Rep. 448; *Retail, Wholesale and Department Store Union, AFL-CIO:CLC v. Dominion Stores Limited* [1964] OLRB Rep. 447; *International Association of Machinists v. Essex Wire Corporation Limited v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, Affiliated with the I.B. of T.C.W. & H of A.* [1965] OLRB Rep. 490; and where compliance with the directions of Form 8 and the standards of accuracy and disclosure contained therein were not met the Board has invariably found that there is not sufficiently reliable evidence concerning membership documents.

As the Board noted in *Emanuel Products Limited*, [1977] OLRB Rep. Feb. 37:

11. The Form 8 declaration plays a central role in the certification process. It serves a dual purpose, in that it provides the Board with further evidence in support of the cards filed other than *viva voce* evidence of a union officer that was required prior to the introduction of the form in 1960, and forces a measure of responsible supervision upon the sponsor of the application. A deficiency in the Form 8 declaration is therefore seen as going to the root of the application and may result in its dismissal. *Collingwood Shipyards supra*, 67 CLLC ¶16,017.

The Board's concern in requiring a Form 9 Declaration is to have confirmation that the membership documents referred to in the Declaration are reliable as evidence of the facts stated in them: namely, that each persons whose signature purports to appear on the document did apply for membership in the trade union and did personally pay the initiation or other fee, receipt of which is ordinarily evidenced by the collector's signature and payment is ordinarily acknowledged by the applicant's counter signature. The concern, for the most part, is about the possibility of defects not apparent on the face of the documentation tendered. Where such defects are discovered otherwise than through disclosure in the Form 9 Declaration, the Board's treatment of other membership evidence submitted with the same declaration comes into question, and the thoroughness and propriety of the declarant's investigations will be of critical relevance in answering that question. In this case, however, the defect which concerned the Board is a defect apparent on the face of the documents. Indeed, it is a defect acknowledged and disclosed in Mr. Pretty's letter to the Board of June 28th. The Board does ordinarily permit the amendment of From 9 Declarations before the hearing (see, for example, *Continental Can Company of Canada Limited*, [1971] OLRB Rep. Apr. 216 at paragraph 5), and it might fairly be said that Mr. Pretty's letter of June 28th made the disclosure which ought to have been noted originally in his Form 9 Declaration, and did so at a time at which, and in circumstances in which, the Board would ordinarily have permitted amendment of the Form 9 Declaration. While the Board is concerned about the cavalier approach Mr. Pretty took to signing the Form 9 Declaration, the greater concern in any particular case is whether there has been a cavalier attitude to conducting the inquiries contemplated by that form. This takes us back to the evidence of the collectors and Mr. Pretty and to the final question of the extent to which such evidence should be entertained.

9. Section 73 of the Board's Rules of Procedure addresses the subject of evidence of membership in the trade union. Subsection 1 of that section requires, *inter alia*, such evidence be in writing and signed by the employee. Subsection 2 provides:

(2) No oral evidence of membership in a trade union . . . shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

The extent to which oral evidence can be introduced to "identify and substantiate" written evidence of membership has been the subject of a number of Board decisions, many of which are reviewed in *PRC Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May. 749. In that case the Board observed that a distinction had been drawn between defects in documentary membership evidence which are "substantive" and those which are "merely formal or technical". In the case of proof of membership within the statutory definition, the fact of application for membership and payment of at least \$1.00 are each substantive matters, and

the failure of documentary evidence to address either element would be a substantive defect. The absence of other information, such as the date of the application for membership, is said to be a "formal or technical defect" because it does not go to the substantive elements of proof of membership. The Board's decision in *PRC Chemical Corporation of Canada Ltd.*, (at paragraphs 23 and 26) puts the absence of a collector's signature in the latter category. Although those statements were *obiter dicta*, we accept them as correct. It follows that although the Board cannot entertain *viva voce* evidence that the payment was made in order to establish that it was, it can entertain that evidence in order to identify the person to whom the payment was made, just as it can entertain such evidence in order to establish the date on which the payment was made.

10. The cards filed with this application are, with respect to each employee signatory, written evidence that he or she meets the statutory definition of "member" set out in section 1(1)(l) of the *Labour Relations Act*. The oral evidence tendered by the applicant satisfies us that the procedures and inquiries required by Form 9 were carried out. There is no suggestion of any impropriety in the solicitation of membership in the applicant, not the slightest hint of any defect in any of the applicant's membership evidence other than the one with which we have been concerned to this point.

11. Counsel for the applicant acknowledged that Mr. Pretty had not treated the Form 9 Declaration with proper respect, and that no excuse could be made for him in that regard. Having heard Mr. Pretty's evidence, we would add to his counsel's acknowledgment the observation that Mr. Pretty adopted a cavalier attitude to documentation generally. We find it completely unacceptable that a trade union official would sign documents in blank, and leave it to someone else to complete them. The issue with which we have been faced, however, was not whether Mr. Pretty's behaviour or approach was acceptable, but whether the applicant's membership evidence was satisfactory. After hearing the evidence and the submissions of counsel, we determined that the evidence was satisfactory. Having found that the applicant was a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, we ruled orally at the hearing, and endorsed the record, as follows:

For reasons to be delivered at a later date, we are satisfied that not less than thirty-five per cent of the employees in the bargaining unit referred to in paragraph 3 of the Board's decision herein dated July 16, 1984, which the Board determines is the unit of employees of the respondent appropriate for collective bargaining, were members of the applicant on the date this application was made. We therefore direct that the ballot box herein be unsealed and that the ballots therein be counted.

12. The ballots were then counted, and notice of the result was given in accordance with the Board's Rules of Procedure. No statement desire to make representations with respect thereto has been filed with the Board within the time fixed under subsection 2 of section 70 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of July 16, 1984, in this matter.

13. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

14. A certificate will issue to the applicant.

15. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.

1270-84-R Local 636, International Brotherhood of Electrical Workers AFL-CIO-CLC, Applicant, v. **Markham Hydro Electric Commission**, Respondent, v. Mr. R. G. Ewasiuk, Intervener, v. Group of Employees, Objectors

Certification — Petition — Employee who originated petition not testifying — Petition signed in presence of management and on company time using company resources — Employee perception of management involvement causing rejection of petition — Dissent of Board Member setting out guidelines for a valid petition

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *B. Fishbein and W. Moore for the applicant; M. B. Millman, Ray G. Ewasiuk, Jim Tearne, Colin S. Parmenter and Russ Jandicu for the respondent; Dale Watson and Peter Placzek for the objectors.*

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; October 12, 1984

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2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent, save and except foremen, those above the rank of foremen, office staff, arrears officers, students employed for the school vacation period, students employed in a co-operative training programme and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied, on the basis of the evidence before it, that thirty-eight of the fifty-three employees in the aforesaid bargaining unit at the time the application was made were members of the applicant on August 24, 1984, the date which the Board determines, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Accordingly, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit on the application date were members of the applicant at the relevant time. In these circumstances, the Board would ordinarily certify the applicant without a vote, pursuant to subsection 7(3) of the Act. In this case, however, a document

expressing opposition to the application was filed in a timely manner. The Board's treatment of such statements was explained in *Unlimited Textures Company Limited*, [1984] OLRB rep. Jan. 138 at paragraphs 15, 16 and 17:

15. The object in certification proceedings is to determine whether a majority of employees in a unit appropriate for collective bargaining wish to be represented by the applicant trade union in their relationship with their employer. Important considerations underlie the Legislature's choice between membership evidence and the representation vote as the means of ascertaining majority wishes (see Weiler, P.C., *Reconcilable Differences*, (Carswell, 1980), at pp. 37-49 for a review of these considerations). The Legislature's choice of membership evidence as the primary basis for the certification decision recognizes the obvious correlation between a desire for trade union representation and the act of joining a trade union. Any uncertainty inherent in equating the two is balanced by striking a confidence level of fifty-five per cent membership at and below which the appearance of majority support for trade union representation must be confirmed by a representation vote. When there is satisfactory evidence that over fifty-five per cent of the employees in the unit are members of the applicant, the Act authorizes certification without a vote. In giving the Board a discretion to order a vote even when over fifty-five per cent membership is demonstrated, the Legislature recognized the possibility that circumstances other than the number of members in the unit might, in a particular case, make trade union membership seem less reliable as a measure of an employee's desire for trade union representation. That discretion should be exercised in a manner consistent with the balance struck by the Legislature in emphasizing membership evidence as the method of determining employee wishes when membership support exceeds fifty-five per cent (see *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB rep. Feb. 81 at ¶8; *Baltimore Aircoil Interamerica Corporation*, [1982] OLRB Rep. Oct. 1387 at ¶49; *Walbar of Canada, Inc.*, [1982] OLRB Rep. Nov. 1734 at ¶17.)

16. Rule 73 of the Board's Rules of Practice makes provision for the filing by employees of evidence of their objection to certification. As with membership evidence, evidence of objection must be in writing, signed by the employee(s) and filed not later than the terminal date for the application (which is ordinarily the date set by the Board under section 130(2)(j) of the Act as the date as of which employee wishes are to be ascertained). Form 6, the Notice to Employees of Application for Certification, refers to such written evidence as a "statement of desire"; such documents are also commonly referred to as "petitions". Subsection 5 of Rule 73 sets out the Board's requirement that *viva voce* evidence be introduced at hearing as to the circumstances concerning the origination and circulation of the petition and the manner in which each signature thereon was obtained. The object of that inquiry is to determine whether the petition is a voluntary expression of the wishes of its signatories (see *Baltimore Aircoil Interamerica Corporation*, *supra*, ¶40.)

17. If a petition is shown to be the voluntary expression of the wishes of its signatories, the effect then given to it depends on the extent to which

it casts doubt on the significance of membership in the applicant as evidence of the employee's desire for representation by the applicant. In the use of membership evidence to test employee wishes, an employee for whom no membership evidence has been filed is treated as though he or she opposes representation by the applicant. Therefore, a non-member's signature on the petition adds nothing to the assessment of support for representation by the applicant. However, the signature on the petition of an employee who is a union member casts doubt not on that employee's status as a member, but on the otherwise reasonable inference that the employee's membership in the trade union reflects a desire for representation by that trade union in collective bargaining with his employer. The evidence of an employee's membership, that is to say, the inference which otherwise reasonably follows from proof that the employee is a member, is "clouded" in that sense by the employee's subsequent signature on a voluntary petition. If the membership evidence which remains unclouded would not alone be sufficient to support certification without a vote, then the Board ordinarily exercises its discretion under section 7(2) by ordering a representation vote. However, the petition speaks only to the desires of those who sign it; its existence casts no doubt on the desires of those who did not sign. One employee's change of heart cannot logically be given any more weight than another's consistent opposition. If the membership evidence which remains unaffected by the petition is itself otherwise qualitatively satisfactory and its quantity establishes that more than fifty-five per cent of the bargaining unit employees are members of the applicant, then faithfulness to the scheme of section 7 of the Act requires that the application be treated no differently than if the Board had received neither the petition nor the membership evidence thereby affected. In other words, such a petition is not considered "relevant" to the exercise of the Board's discretion under section 7(2) because it will not alone warrant a decision ordering a vote. If a petition is not relevant, it is unnecessary to determine whether it is voluntary. To take any other approach would be to ignore the Legislature's determination that satisfactory evidence of membership of over fifty-five per cent of the employees in a bargaining unit is evidence of majority support for trade union representation sufficient to permit certification without a vote. The approach described has been applied by the Board openly and consistently for well over twenty-five years. The *Labour Relations Act* has been amended many times in that period. Although amendments to the Act from time to time have altered the levels of membership required for certification with and without a vote, none has been directed at this consistent exercise of the Board's discretion to order a vote. By continuing to apply the test of the relevance of and weight given to petition signatures when exercising its discretion, the Board does not "amend the Act" — it avoids doing so.

6. The body of the petition in this case reads:

The following, whose names and signatures are attached wish to register a statement in opposition to the application made by the applicant (Local 636, International Brotherhood of Electrical Workers AFL-CIO-CFL) with regard to the certification of a union at Markham Hydro Electric Commission.

Our prime concern is the manner in which the vote was conducted. It was not an impartial closed ballot as some of the men were intimidated.

Peter Placzek
Representative.

Of the eighteen signatures which appear below this text, nine correspond with signatures on membership evidence filed by the applicant. If the petition were found to be a voluntary expression of the true wishes of those members of the applicant who signed it, it would cast doubt on the desire for representation by the applicant of a sufficient number of members of the applicant in the bargaining unit as to lead the Board to require the confirmatory evidence of a representation vote, in the exercise of its discretion in that respect under subsection 7(2) of the Act. Accordingly, the Board heard evidence with respect to the origination and circulation of the petition.

7. The thirty-eight applications for membership filed by the applicant in support of this application were all obtained on August 14, 1984 at a meeting at a hotel near the employees' place of work. Some of the employees had met during the previous week and conducted some form of secret ballot vote to determine whether there was a desire to contact the applicant union. The vote was favourable, the applicant was contacted and the meeting of August 14th resulted.

8. Peter Placzek is employed by the respondent in its stores department. He was away during the week in which the first employee meeting was conducted, and did not attend that meeting. He did attend the meeting of August 14th. He was under the impression that the meeting was for the purpose of obtaining further information, and thought other employees had that impression. That was not what happened at the meeting, so far as he was concerned; all that took place was that employees signed applications for membership in the applicant. He says that while he and others stood back watching this process, one of the trade union representatives announced that it now had cards signed by a majority of employees, and that those standing back might as well sign up. It was his observation that a number of employees who had earlier been reluctant then proceeded to sign cards. William J. Moore is one of the two full-time representatives of the applicant who were present at the meeting of August 14, 1984. He firmly denies that either he or his colleague made any statement of the sort referred to by Placzek. He says eight or ten employees were standing around the table at which cards were being signed, keeping track of the number of signed cards. At one point one of these employees announced a majority count and urged others to sign. Moore says that at this point he stood up and told the employees present that he did not wish anyone to apply for membership who did not wish to join. Mr. Moore's version of these events is corroborated by Gerald Tripp, an employee of the respondent who had conducted the earlier employee meeting and was present at the meeting of August 14th. It is not necessary for us to determine which is the more accurate version of these events, since neither version involves any behaviour which would lead us to discount in any way the membership evidence collected at that meeting. Whatever did happen, Placzek says it left him dissatisfied, and led to discussions with fellow employees which focused, he says, on the absence of a secret ballot vote.

9. This application was filed on August 15, 1984. The Board gave notice of the application to the employer, and provided it with several copies of a Notice to Employees in Form 6, for posting. These Form 6 notices were posted on August 21, 1984. Mr. Placzek read a copy posted near his work area, and concluded that an "avenue of protest" was available to him and the other dissatisfied employees with whom he had spoken. The following morning he spoke

to Jackie Hare, who is employed by the respondent as secretary to two or three members of its staff, including the Director of Engineering. Placzek told her he wanted to prepare a letter opposing the union, and asked if she would type it for him. She agreed. This conversation took place over the telephone, during working hours. Placzek took down the Form 6 notice he had read, attached to it his handwritten notes of the points he wished to express in his letter, and forwarded them to Ms. Hare via the respondent's internal office mail system. Later that day, David Bogues brought Placzek the typewritten document on which he subsequently obtained the signatures of eighteen of the respondent's employees. Bogues sits at the desk next to Placzek in the stores office; he is the stores foreman, and is known to employees to be related by marriage to the respondent's Manager. Placzek is sure he must have had some discussion with Bogues about the letter, which Bogues could easily have read as it was not enclosed in any envelope when he brought it to Placzek. Placzek did not seek Bogues' signature on the document, since he recognized Bogues as a member of management. The note Placzek sent to Ms. Hare was not a handwritten verbatim draft of the typewritten document brought to him by Bogues. Placzek had left it to Ms. Hare to express his words in suitable language. Although he assumes she did that, he has no personal knowledge of what happened to his handwritten notes, or how the typewritten document found its way into Mr. Bogues' hands, or whether any other member of management saw the document or participated in the drafting of it. Ms. Hare was not called as a witness, although the Notice to Employees explicitly alerts employee objectors to the necessity of calling witnesses who can testify from personal knowledge as to the circumstances concerning the origination of the material filed.

10. Placzek signed the document when he received it. He obtained nine other signatures that day: one during the lunch hour, one during the signatory's coffee break and the balance during working hours. He obtained seven more signatures the following day, all but one of them during working hours. The last signature was obtained the following morning, August 24th. The employees who signed all came to Placzek's desk to do so. It seems likely, as Placzek acknowledges, that Mr. Bogues was at the next desk when most of these signatures were obtained, and could have seen and heard enough to know who was signing and what was being signed. Placzek acknowledges that everyone knew he was getting signatures on a petition; neither Bogues nor any other member of management criticized him for conducting these activities during working hours. Placzek acknowledges that on seeing this neatly typewritten petition, the employees who signed it would accurately conclude that it had been prepared in the respondent's offices.

11. After he had obtained the last of his signatures, Placzek attended on Ms. Hare in person, because upon re-reading the Notice to Employees he realized that his petition had to have his return address on it. She typed that on the document. She also typed a mailing label addressed to the Board, and gave Placzek a manilla envelope. Placzek put the petition in the envelope, sealed it, affixed the mailing label and took the envelope to the respondent's receptionist. He told her to arrange for it to be delivered to the Board by courier. He regularly gives the receptionist instructions of that sort with respect to company correspondence. It is not apparent from the evidence how the receptionist would have known that this was anything other than company correspondence or that anyone other than the company should later be called upon to pay for the courier service. Whoever ultimately pays the courier, the courier did deliver the envelope to the Board on the terminal date.

12. Most non-union employers prefer to remain that way. Employees are as aware of this as they are of their economic dependence on their employer. Their sensitivity to these facts will be heightened during a union organizing campaign even if, upon learning of the campaign,

the employer does nothing overt to enhance that awareness. In these circumstances, an employee's freedom to choose to join or not to join a trade union will be impaired if he believes that the result of his individual exercise of choice will become known to his employer. For that reason, section 111 of the *Labour Relations Act* provides for confidentiality of membership evidence. For the same reason, representation votes, when they become necessary, are conducted by secret ballot. No one would suggest that the wishes of a group of employees with respect to union representation would be accurately reflected in a show-of-hands vote conducted in the presence of their employer. The same disability attaches to a petition which originates or circulates in circumstances which lead employees to believe that their employer will become aware of whether or not they sign. If the circumstances surrounding the origination and circulation of a petition might reasonably be expected to induce such a perception in the employees asked to sign it, that petition cannot be regarded as a voluntary expression of employee wishes. The Board will not act on a petition signed in such circumstances. That is so even if actual management involvement is not proved, because the immediate issue is the reliability of the petition, not the propriety of management behaviour: see *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813.

13. Those who would have the Board act on a petition bear the onus of establishing that its origination and circulation were free of actual or perceived involvement of management. In order to satisfy this onus, those who rely on the document must adduce evidence of the circumstances surrounding its origination, preparation and circulation. Any gap in the evidence of the history of the document, from preparation to delivery to the Board, may prove fatal: *Formosa Spring Brewery*, [1974] OLRB Rep. 696; *CIP Victoria Ltd.*, [1979] OLRB Rep. Nov. 109, *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289; and, *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181. In this regard, the failure to call Ms. Hare as a witness is a most serious defect in the objectors' case. Equally serious are the involvement of the foreman in handing Placzek the form used by him, the likely presence of that foreman when the document was being signed by other employees and the very apparent freedom Placzek was afforded to conduct these activities on "company time" using the resources of the respondent. These circumstances all go to the perception its signatories are likely to have had about the petition's origin and purpose and the likelihood that the fact of their signing or refusing to sign would come to the attention of their employer. It is concern for these employees' perceptions, not purposeless mechanical application of unwritten rules, which guides our appraisal of the reliability of this petition as evidence of a genuine change of heart of those who had so recently joined the applicant. Our concern goes beyond whether Mr. Placzek was *in fact* acting under the direction of management, and embraces the question whether the behaviour of either Placzek or management created the impression of management involvement or direction. There was not the slightest evidence that in any other circumstances this employer tolerated open, insouciant conduct of supposedly personal business for significant periods on company time and with company resources. It would have seemed to employees that the members of management would know whether or not they signed Mr. Placzek's petition. In all these circumstances, we are not prepared to give this petition any weight in the exercise of our discretion under section 7(2) of the Act.

14. One other matter must be considered in disposing of this application. Mr. Placzek's petition says:

Our prime concern is the manner in which the vote was conducted. It was not an impartial closed ballot as some of the men were intimidated.

It is important to note that there was no evidence that anyone on behalf of the union had suggested to any employee that signing a card was a preliminary to or would necessarily result in a secret ballot vote of any kind. Had there been such evidence, that would have been a relevant consideration in the exercise of our discretion under subsection 7(2), quite apart from any question of the voluntariness or numerical relevance of the petition: see *Carleton University*, [1975] OLRB Rep. Apr. 308. Not only was there no evidence that any such representations were made, there is no evidence that anyone who signed a card did so in the belief, whatever its origin, that there would be a vote. Indeed, we have no explanation at all for Mr. Placzek's belief that there *would* be some kind of vote. As a matter of law, none is required. Whether Placzek or anyone else felt that a vote *should* be required is a matter of legislative policy beyond our jurisdiction. We are obliged to administer the Act as it is and not as we may feel it ought to be. To order a vote merely because some employees feel there ought to be one would be to defy the policy inherent in the present legislation.

15. Accordingly, a certificate will issue to the applicant with respect to the bargaining unit described in paragraph 4 of this decision.

DISSENTING OPINION OF BOARD MEMBER W. H. WIGHTMAN;

1. In an earlier case, *New Strathcona Hotel (Toronto) Ltd. Berkeley Savoy Hotel*, [1976] OLRB Rep. May 308, I adumbrated some of the tests the Board requires to be meticulously followed in order to have a petition validated so as to secure a secret ballot vote:

- (1) the person circulating the petition cannot discuss it with the employer
- (2) the person circulating the petition should not obtain signatures on the company property
- (3) the person circulating the petition should not obtain signatures within sight of a member of management
- (4) every signature on the petition must be witnessed and such witness must testify before the Board on matters relating to the preparation of the petition, the obtaining of the signatures and the circulation of the document in question
- (5) the petition must not leave the person's hand who circulates it — if it does, then the person it is given to must appear before the Board to give evidence
- (6) the person circulating the petition must not get time off from work in order to mail the petition by regular mail (it must be noted that special delivery mail, even if mailed by the terminal date, will be rejected by the Board)
- (7) the person circulating the petition must not arrange for time off with pay to attend the Board hearing
- (8) should the person circulating the petition have any member of management sign it for whatever reason (even if the member of management

believes he or she is in the bargaining unit) then all signatures secured subsequent to that of the member of management are disregarded by the Board, and

- (9) the person circulating the petition is subjected to rigorous cross-examination by the Board on questions pertaining to the origination, preparation and circulation of the petition.

2. From the evidence recited in the majority decision, which came to us in a straightforward manner from the petitioner himself, it is evident that the petitioner sealed his own fate by a number of errors of omission and commission any one of which would have allowed the Board to reject the petition using tests the Board has devised based on its concept of human nature and human relationships. It should be stressed that the above noted tests are not to be found in the legislation; rather they are a reflection of a viewing of the world of work which the Board is permitted to take and act upon under its broad discretionary powers. While Professor Weiler is entitled to his own views, as cited at paragraph 15 of the majority decision, the nature of the legislative process is such that I would dispute his entitlement to impute reasons for its "choice of membership evidence as the primary basis for the certification decision". In any event legislators in the Province of Nova Scotia, if they have read his book, do not find his argument persuasive and in recent years have turned to a preferential use of the secret ballot. Similarly the U.S. Congress has held firm to a policy of mandatory certification votes, except in the case of voluntary recognition, for many years through a variety of political administrations. Professor Weiler comments on the law: As a member of this administrative tribunal I do not presume to comment on the law but only on our interpretation of it.

3. It is a view with which we as individual members of the Board are not obliged to subscribe. In the case at hand, for instance, I am entitled, and do, believe that the insouciance with which Mr. Placzek went about his efforts to oppose the union would suggest a total indifference as to what the preference of his employer may have been. The sheer number of "mistakes" (from the point of view of Board "tests") suggests in the strongest possible terms that he was acting totally without direction or guidance from anyone. His story is too bizarre *not* to be true and I would have concluded that indeed the petition did reflect the free and voluntary wishes of the signatories.

4. As I reflect on my early dissent, I note that I omitted mention of a further reality in connection with the treatment accorded petitions. I refer to the fact that the construction the Board has put on the issue of secret ballot representations is such that whereas an employee may sign a card in the first instance on the assumption a vote will be held, if sufficient cards are signed certification will be given automatically even if all those who signed were to subsequently request a vote. Thus, it seems to me, Board practice is to exercise its discretion in one direction only.

5. It seems to me there could well be individuals who, though they support the union, might be content to allow their working colleagues a secret ballot vote out of a sense of fairness to them. I do not think it is correct that only by opposing the union should union supporters have it within their power to accommodate co-workers who might prefer a vote.

6. I give full credit to Mr. Moore of the IBEW for his efforts to set the record straight in his remarks to employees at the August 14th organizing meeting. He acted fairly and responsibly. Moreover his words reflect an understanding that peer-group pressure can be every

bit as coercive as the apprehensions the Board harbours with respect to employers. To all of this I can only iterate my long-held view that the safest place for an individual to express one's innermost feelings is in the sanctity of a government supervised voting booth and I would have directed the utilization of that unique instrument of democracy.

1364-84-R International Union of Operating Engineers, Local 793, Applicant, v. **Myer Salit Limited**, Respondent, v. United Steelworkers of America, Intervener

Bargaining Unit — Practice and Procedure — Applicant seeking bargaining rights for existing engineers — Whether already covered by intervener union's agreement — Whether scope clause ambiguous — Parties' longstanding practice of treating hoisting engineers as excluded considered — No concern about fragmentation where hoisting engineers only group left out

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and C. A. Ballentine.

APPEARANCES: *J. Redshaw and D. Bannerman for the applicant; Laurence Cohen and Irvin Feldman for the respondent; David Nicholson for the intervener.*

DECISION OF THE BOARD; October 3, 1984

1. This is an application for certification by Local 793, International Union of Operating Engineers, to represent the two crane operators employed by the respondent.

2. The intervener United Steelworkers of America takes the position that the crane operators are already covered by the "all-employee" collective agreement it has with this employer. The employer concurs in that position. It is conceded by both the respondent and the intervener, however, that the intervener has never sought to bargain nor received union dues on behalf of the respondent's crane operators at any time during the twenty-seven years that the intervener's "all-employee" agreement has been in effect. The parties opposing this application argue nonetheless that the intervener's collective agreement is clear on its face, and that there is no exclusion in its scope clause which could arguably be said to apply to these crane operators.

3. The scope clause of the intervener's collective agreement has been in the same form since the agreement was first entered into following certification of the Steelworkers in 1957. That scope clause reads:

ARTICLE 1 — RECOGNITION

- 1.01 The Company recognizes the Union as the exclusive bargaining agent of all the employees of the Company at Niagara Falls, save and except foremen, those above the rank of foreman, office staff,

and all hoisting engineers operating cranes, crawlers, or mobile type derricks, oiler-drivers, or mobile cranes employed by the Company and its erection department or structural steel division in the Province of Ontario.

- 1.02 The term “employee” as used in this Agreement, unless it is clearly indicated otherwise, shall be deemed to mean only those employees who are included in the bargaining unit.
- 1.03 Inasmuch as the Union accepts the responsibility of collective bargaining for all employees, including students and temporary help, in the bargaining unit, with the exceptions hereinbefore stated. All employees shall be required to become members of the Union as a condition of employment and sign an authorization for Union initiation fees, monthly union dues deductions and assessments; such authorization shall be in the form shown in Schedule “A” attached hereto, and shall be supplied by the Union.

The explanation given for the description of the bargaining unit in those terms is that the company at that time operated essentially two divisions out of the same location, one being a scrap-yard operation as at present, and the other involving shop-fabrication and field-erection. The company at that time had one crane which it used to service both operations. For that purpose it employed one crane operator, as well as one oilman who was required for the occasions when the crane was moved into the field for erection work. The company indicated to the Steelworkers that it did not wish to create problems with the building-trades unions, and so it was agreed to exclude these crane-related employees from the Steelworkers’ certificate. From that point, the crane operator and oilman were treated as falling at all times under a collective agreement with the International Union of Operating Engineers, and received the rate under that collective agreement whether working in the fabricating or the scrap-yard side of the business. The Engineers subsequently negotiated an additional premium to that rate to apply when its members were required to engage themselves in field-operations away from the shop.

4. In about 1965, the respondent employer entered into an arrangement with a second company, Modern Iron and Steel, to take over at the second company’s own location the fabrication and erection side of the respondent’s business. That arrangement was dissolved a short time later, and the respondent has not subsequently carried on any fabricating or erecting of its own. The crane that the respondent retained continued to be used in its scrap-yard operation only, and the respondent ceased to negotiate with any union with respect to the rate of pay and working conditions of the operator. The operator generally picks up the conditions of work and benefit programs of the scrap-yard employees with whom he works, but it is conceded that no rate was ever negotiated for him in the Steelworkers’ agreement, nor any dues ever checked off to the Steelworkers in accordance with the provisions of Article 1.03. That has been the situation now for some 20 years, the only change being the addition relatively recently of a second crane and part-time operator.

5. There is, of course, no issue of “abandonment” arising in the present case with respect to the applicant Local 793. Local 793 has not taken the position that it has maintained bargaining rights for the operators in question, but rather has filed an application for certification, together with freshly-signed cards indicating that those operators now wish Local 793 to represent them in collective bargaining. The intervener, on the other hand, does seek to assert

bargaining rights on the basis of its 27-year old collective agreement. It argues that the phrase “all hoisting engineers operating cranes . . . employed by the Company” can only be read in conjunction with the words “and its erection department or structural steel division”, and that the exclusion clearly has no application to hoisting engineers employed in the respondent’s scrap-yard operation, which is the subject of the Steelworkers’ collective agreement.

6. The Board is of the view, however, that the use of the word “and” after “employed by the company”, rather than, for example, “in”, creates an ambiguity on the face of Article 1.01 of the agreement, and that in any event, there is a *latent* ambiguity in Article 1.01 as to what is meant to happen with respect to hoisting engineers employed by the company should a separate erection department or structural steel division cease to exist. And the unbroken evidence of practice for the twenty years since that eventuality became a fact is that the hoisting engineers *continued* to be treated as an exclusion from the scope of the Steelworkers’ “all-employee” collective agreement.

7. This situation has some interesting parallels with what was before the Board in the recent case of *Silverstein’s Bakery*, [1983] OLRB Rep. Dec. 2095. There the existing collective agreement between the employer and the incumbent union contained an exclusion only for “drivers”, and the applying trade union sought to organize those persons whom it considered to fit the description of “drivers”. In doing so, it approached only those individuals regularly employed to take the company’s trucks out on the road. There were, however, a number of employees who performed functions tangential to the actual driving of the trucks, such as shipping and receiving, and who were also called upon to serve as relief drivers on a sporadic basis, as required. Both the employer and the incumbent union took the position that the incumbent’s collective agreement had never been meant to apply to persons in these tangential driving categories, and that in fact it never had been. The majority of the Board ruled, in light of the use in the scope clause of the ambiguous term “driver”, that it was the unequivocal interpretation placed on that word in practice by the two parties who had used it which governed its meaning, and that the “newcomer” union was accordingly required to take the situation as it found it. In coming to that conclusion with respect to at least the latent ambiguity present in that case, the majority of the panel was not necessarily in disagreement with the basic principle espoused by Board Member Armstrong in his dissenting opinion that:

I am of the view that employees and third parties place considerable reliance on the clear words contained in the scope and recognition clause of a collective agreement. This Board should encourage, rather than discourage, such reliance.

8. In the present case the Board has found that the collective agreement governing the relationship between the respondent employer and the intervener does *not* contain “clear words” as to its scope; rather, it can be seen to contain a latent, if not a patent ambiguity, and resort to the longstanding practice of the parties is therefore admissible. That practice establishes unequivocally that hoisting engineers operating cranes were considered to be excluded from the scope of the intervener’s collective agreement, even after the disappearance of a separate erection department and structural steel division. We therefore find that hoisting engineers are not covered by the Steelworkers’ collective agreement, and the application for certification is accordingly timely with respect to the bargaining unit of hoisting engineers now sought by the applicant.

9. The intervener argues, in the alternative, that such a bargaining unit would not be accepted by the Board on an initial certification, out of a concern for undue fragmentation, and ought not to be accepted in circumstances such as the present either. The Board finds that submission wholly without merit. The fact is that it is the employer and the intervener themselves who have "carved out" this group as the only exclusion (outside of foremen and office staff) to the intervener's "all-employee" unit, and it is now the *only* unit left open for organization (any accretions to the respondent's work force beyond this excluded group will fall into the Steelworkers' bargaining unit by virtue of its "all-employee" designation). Any time the parties to a collective bargaining unit agree to the exclusion of categories capable of being organized, they run the risk that that organization will be carried out by a trade union other than the incumbent.

10. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

11. Having regard to the meaning which the Board has found the scope clause of the intervener's collective agreement presently bears, and in order to minimize any ambiguity in the future, the Board finds all hoisting engineers operating cranes, crawlers, or mobile-type derricks, oiler-drivers, or mobile cranes employed by the respondent in the Province of Ontario to be a unit of employees appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 4, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

2908-83-M United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Applicant, v. **Reimer Overhead Doors Ltd.**, Respondent

Arbitration — Construction Industry Grievance — Evidence — Practice and Procedure — Applicant leading hearsay evidence to establish work performed by non-union members — Respondent no leading any evidence to contradict — Whether Board relying on hearsay to find violation — Extent of admissibility of hearsay in arbitration proceedings considered

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and I. Stamp.

APPEARANCES: *Douglas J. Wray, Wm. Sherman and Walter Sohlman for the applicant; Robin B. Cumine for the respondent.*

DECISION OF THE BOARD; October 2, 1984

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

2. The applicant alleged in its grievance that the respondent had violated the collective agreement presently in effect between the applicant and the respondent with respect to two jobs — one in the town of Kenora and one in the city of Thunder Bay. The respondent is described in the application as having its address in Steinbach, Manitoba. The hearing in this matter was held in Toronto. The applicant appeared before the Board in the person of its business representatives, William Sherman and Walter Sohlman, and counsel. The respondent did not file a formal reply in Form 107. However, the respondent advised the Board in a letter from counsel that it denied the allegations contained in the grievance and put the applicant to the strict proof thereof. Counsel appeared at the hearing on behalf of the respondent. At the commencement of the hearing, counsel for the respondent advised the Board that the respondent was in disagreement with the applicant's claim of bargaining rights and its grievance with respect to both jobs. Counsel for the respondent characterized the applicant's allegations as containing positional and factual errors.

3. Mr. Sherman and Mr. Sohlman gave evidence before the Board and were cross-examined by counsel for the respondent. Counsel for the respondent did not call any evidence. The evidence established that on April 23, 1982, the Board issued two certificates with respect to employees of the respondent. In the first certificate the Board certified the applicant as the bargaining agent for all carpenters and carpenters' apprentices in the employ of the respondent, in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. In the second certificate the Board certified the applicant on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, a designated employee bargaining agency, as the bargaining agent for all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

4. Mr. Sherman is responsible for the District of Kenora (including the Patricia portion) and Rainy River. Mr. Sohlman is responsible for the District of Thunder Bay. In the course of performing his duties, Mr. Sohlman observed a job in the city of Thunder Bay at the P & J Tire Centre. He observed two men in the respondent's truck. He spoke to one of the men and was informed that the boss was in Winnipeg and they were there to hang doors. Mr. Sohlman observed the two men prop up a door with timber and gave evidence that there were two two-men doors and two single-man doors to be installed. He informed the Board that such work would require fifty man-hours for a carpenter to complete. He did not see whether the two men attached the necessary hardware to the doors. He estimated that it would have taken six to eight hours to attach the necessary hardware. Mr. Sohlman gave evidence that the two men were not members of the applicant and that the applicant had members out of work who were ready, willing and able to do the work performed by these two men.

5. Mr. Sherman gave evidence that he visited the Wally Newfield Auto Service garage in Kenora and observed that two overhead doors had been installed at that garage. He did not see the doors installed. The owner of the garage informed Mr. Sherman that the respondent had installed the two doors and that it had taken two men ten hours to install the doors. Mr. Sherman identified a copy of the provincial collective agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America effective from June 21, 1982, until April 30, 1984 (the "collective agreement"). He gave evidence that he had signed up employees of the respondent at the time of the certification. While the applicant accepted the cards of the employees who signed applications for membership in the applicant, these employees were not present to be admitted into membership in the applicant. He explained that as of the date of the projects being grieved, the persons who signed applications for membership at the time of the certification were not members in good standing. Mr. Sherman informed the Board that the work of installing overhead doors was work performed by carpenters and that the work at the Wally Newfield Auto Service was not performed by members of the applicant. He testified that there were unemployed members of the applicant who were willing and able to perform the work.

6. The applicant claimed compensation under the provisions of the collective agreement by virtue of violations of article 5.01(a) and 5.01(b). This article states:

ARTICLE 5 – UNION SECURITY

5.01(a) The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Brotherhood of Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing the work required.

(b) Except as modified by the provision of sub-section (c) of this Article, all employees covered by this Agreement shall be hired by the employer through the offices of the Local Unions and District Councils having jurisdiction over the geographical area, set out in Schedule "B", where work by the employer is to be performed. Such hiring shall be done by way of a referral slip issued by the Local Union or District Council.

Schedule "B" of the collective agreement provides:

Local 1669, THUNDER BAY, ONTARIO

Districts of Rainy River, Kenora (including Patricia Portion), Thunder Bay and that part of the Districts of Algoma and Cochrane lying north of the 49th parallel and all of the area lying west of the North Driftwood River, Abitibi River and Moose River, including the rivers herein named.

Schedule "D" of the collective agreement provides for the wages and related payments to be made to employees working under the collective agreement in the geographic area affected by this grievance. Effective May 1, 1983, the hourly rate was \$19.03 with ten per cent vacation pay at \$1.90 per hour and employer contributions and employee deductions to the Apprenticeship Fund, the Association Administration Fund and the Union Administration Fund set at fourteen cents per hour. The total hourly rate and related payments is therefore \$21.07 per hour.

7. The Board finds that the installation of the doors in Kenora and Thunder Bay is work performed by carpenters within the industrial, commercial and institutional sector of the construction industry. The Board further finds that by virtue of the decision of the Board dated April 23, 1982, and pursuant to the provisions of sections 137(2) and 145 of the *Labour Relations Act*, the respondent and the applicant are bound by the provisions of the collective agreement.

8. The respondent argued that the applicant had not proven its grievance before the Board. The respondent argued that the Board had virtually no evidence that was admissible. The respondent stressed that the evidence with respect to the job in the town of Kenora was totally hearsay and that the evidence as a whole was limited to brief periods of time while the claim related to several hours of work. The respondent argued that someone from the respondent could have been subpoenaed to bring records and that the hearing could have been held closer to the respondent's home. The Board heard the briefest of arguments with respect to the hearsay nature of the evidence. At the invitation of the Board, the parties subsequently made written submissions on the issue of the admission of the hearsay evidence before the Board.

9. In section 103(1) of the *Labour Relations Act*, the Board is directed to exercise such powers and perform such duties as are conferred or imposed upon it by or under the Act. Section 103(2)(c) of the Act provides:

103. -(2) Without limiting the generality of subsection (1), the Board has power,

• • •

(c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.

This referral has been made under the provisions of section 124 of the *Labour Relations Act*. Section 124(3) states:

124. -(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter

is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Section 44(8)(c) states:

44. -(8). . .an arbitrator or an arbitration board, as the case may be, has power,

• • •

- (c) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not.

Quite clearly the Board has the power to accept oral or written evidence whether admissible in a court of law or not under the general provisions of section 103(2)(c) and also when entertaining a reference under section 124 by virtue of the specific provisions of section 44(8).

10. Hearsay may be defined as a third person's assertion narrated to the Board by a witness for the purpose of establishing the truth of that which was asserted. The Board has regularly admitted hearsay evidence and has then addressed the issue of the weight to be given, if any, to such evidence. See, for example, *Du Pont of Canada Limited*, [1961] OLRB Rep. Jan. 360 (harassment); *Lindhaven Home for the Aged*, [1962] OLRB Rep. May 66 (intimidation or coercion); *Beef Terminals Limited*, [1971] OLRB Rep. May 300 (merger, amalgamation or transfer of jurisdiction by a trade union); *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 (coercion). In these cases the Board has generally not been prepared to give weight to hearsay evidence where the persons directly involved neither testified nor gave any explanation for the failure of such persons to testify. The Board has always accepted and relied upon, in the absence of evidence to the contrary, documentary evidence of membership in a trade union. Such evidence is, of course, hearsay in nature. Moreover, the Board accepts hearsay evidence in the form of statements of desire in applications for certification and in applications to terminate bargaining rights.

11. The approach of boards of arbitration to hearsay evidence has undergone a process of evolution. In *Re United Electrical Workers Local 514 and Amalgamated Electric Corp. Ltd.* (1961), 12 L.A.C. 180, the Board stated at pages 184 to 185:

This Board, of course, is permitted to entertain testimony which would not be considered evidence in a court of law, but nevertheless arbitrators should be careful to apply the best evidence rule whenever possible, and the best evidence is, of course, testimony given by witnesses who saw the events which are described or made the statements attributed to them. This Board, therefore proposes to eliminate from its consideration anything but first hand evidence adduced before it in fairness to the grievor, and in view of the fact that a great deal of contradictory evidence was given by the company witnesses.

However, generally speaking the hearsay rule has been followed in arbitration proceedings, and, although arbitrators are, of course, not required to so limit themselves, they have retained

the discretion as to whether to admit such evidence, and if admitted, to ascribe to it whatever weight they believe is proper. See Palmer, *Collective Agreement Arbitration in Canada* (2d Edition 1983, pages 87 to 89); Brown and Beatty, *Canadian Labour Arbitration* (1st Edition 1977, pages 122 to 123); and also, for example, *Re Therrien and Treasury Board (Department of Manpower and Immigration)* (1978), 21 L.A.C. (2d) 120 and *Re Firestone Steel Products of Canada and United Steelworkers, Local 27* (1980), 28 L.A.C. (2d) 173, but *contra* see *Re Barber Hydraulic Turbine Ltd. and United Steelworkers* (1978), 19 L.A.C. (2d) 247.

12. The general refusal by arbitrators to make findings of fact on the basis of hearsay evidence is usually based on the decision of the Divisional Court in *Re Girvin et al. and Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509. Here the Court, after noting the section of the Act granting an arbitrator the discretion to admit hearsay evidence, stated at page 512:

This subsection was considered by the Court of Appeal for Ontario in *R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union, Local 419*, [1968] 2 O.R. 245, 68 D.L.R. (2d) 682. Mr. Justice Jessup, for the Court, at p. 252 O.R., p. 689 D.L.R., after quoting the subsection above referred to, said:

By that clause the Legislature recognized that arbitrations will frequently be presented before arbitration boards by lay persons. Accordingly, it relaxed the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence to be adduced without objection. However, that provision does not relieve a board from acting only on evidence having cogency in law.

It is to be observed that the board in this case made a finding of fact excluding, in effect, the evidence of the grievor and relied exclusively on hearsay evidence, some of which evidence was in conflict. Such evidence may well be admissible by reason of the subsection of the *Labour Relations Act* above referred to, but it must be borne in mind that in cases of this type the burden is on the employer to show that the employer acted properly in the discharge of the employee and in order to satisfy that burden in this case the employer, in effect, relied exclusively on hearsay evidence. *Even though that evidence may well have been admissible we are all of the view that the employee did not receive a fair hearing in the circumstances.* His counsel had no real opportunity to cross-examine on the evidence that was presented.

The importance of cross-examination in a case of this type is pointed up by evidence which was hearsay evidence concerning the statements made by Mr. Alexander. To one witness Mr. Alexander apparently said that the installation had been made in the winter and to another in the late spring. The date upon which the installation had been installed was crucial in this case. In the circumstances, we are all of the view that the award should be quashed and the matter remitted to the board of arbitration for further consideration.

[emphasis added]

Girvin had been cited in numerous arbitral awards as the basis for the proposition that no finding should be made exclusively on the basis of hearsay evidence. Though this arguably may be the necessary result of following *Girvin*, it would seem from that part of the decision reproduced above that whether a finding of fact may be based on hearsay evidence alone in any individual case turns on whether the party, "did not receive a fair hearing in the circumstances," due to his inability to properly cross-examine on the evidence presented and/or contradict by other evidence the evidence presented.

13. The provisions of section 44(8)(c) of the *Labour Relations Act* have been commented on recently in the marathon case of *Re City of Toronto and Canadian Union of Public Employees, Local 79* (1981), 125 D.L.R. (3d) 249; (1981), 33 O.R. (2d) 512 at page 514 where Van Camp, J. stated:

We are given to understand that it is the practice to exclude hearsay in spite of s.[now 44(8)(c)]. We were referred to four other instances where boards of arbitration have refused to admit in evidence reports of other bodies. In each case, the report itself was considered. There will be cases where such a report will be excluded because it can have no relevancy or because the principles of natural justice were offended or where the employee had little or no opportunity to participate. But in each case the particular report must be considered before the discretion is exercised. Where there is some relevancy, the general tendency will be to admit it as the board and the Divisional Court in *obiter* here indicated it would have done. It may well be that it will have little or no weight but until all the evidence is in the question of weight must remain undecided. The lack of opportunity for cross-examination, for observation of the witness, the absence of other evidence, all would tell against weight.

The report referred to in *Re City of Toronto* was a report made by a Commission of Inquiry appointed under section 240 of the *Municipal Act* and on appeal in *Re City of Toronto and Canadian Union of Public Employees, Local 79* (1982), 133 D.L.R. (3d) 94; (1981), 35 O.R. (2d) 545, the Court of Appeal held that the refusal of the board of arbitration, at a second hearing, to consider the admissibility of the report was a denial of natural justice. Blair, J.A. stated at page 558:

The purpose of arbitration of grievances under collective agreements is to provide an expeditious and fair method of settling disputes which experience was demonstrated are much better solved in this fashion than by complex judicial proceedings. Most arbitrators are laymen who bring the benefit of their experience to the practical solution of complex human problems. Courts consistently have recognized the special role of arbitration boards and have been loathe to interfere with their decisions or proceedings.

The Court of Appeal concluded by stating that such reports should be admitted in evidence subject to contestation by other evidence and the weighing of their probative value by the board of arbitration. This decision has been followed recently in *Re Silverwood Dairies, Division of Silverwood Industries Ltd. and Canadian Union of Operating Engineers and General Workers* (1983), 3 L.A.C. (3d) 289.

14. The weight of recent judicial authority is to admit hearsay evidence and to then consider the weight to be given to such evidence. The weight to be given to any evidence in general depends on its relevance and its trustworthiness. Trustworthiness is determined by such factors as the credibility of a witness, the reliability of the source of the evidence, the existence of any contradictory evidence and the opportunity of the opposing party to call contradictory evidence and/or cross-examine the source of the evidence. The latter is of particular concern with respect to hearsay evidence and the inability to cross-examine the primary source of the evidence often being put forward as the basis for the hearsay exclusion. Necessity has given rise to a number of exceptions to the rule against hearsay. In discussing such exceptions in Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), the authors state at page 49:

The requirement that testimony be subjected to the test of cross-examination has been dispensed with in situations where the declarant of the words in question is unavailable and his oral or written statement was made under such circumstances in which it can be presumed would impress his remarks with a genuinely trustworthy quality. In many situations such declarations are the only cogent evidence available and to exclude them would result in considerable inconvenience.

Exceptions to the Hearsay Rule therefore developed in situations where, as Sir George Jessel, M.R. stated in *Sugden v. Lord St. Leonards* [1876] 1 P.D. 154, at page 241, the following four characteristics existed:

- (1) It was impossible or difficult to secure other evidence.
- (2) The author of the statement was not an interested party in the sense that the statement was not in his favour.
- (3) The statement was made before the dispute in question arose.
- (4) The author of the statement had peculiar means of knowledge not possessed in other cases.

15. In the instant referral the statements attributed to the owner of the garage certainly satisfy the second and third characteristics referred to in *Sugden*. With respect to the first characteristic, the Board notes that the respondent has its place of business in Manitoba and there was no indication of the availability of officers or servants of the respondent for service of a subpoena in Ontario. The fourth characteristic is apparently not satisfied. The statements of the owner of the garage go part of the way in fulfilling the characteristics referred to in *Sugden*. The respondent had an opportunity to comment upon the evidence before the Board and of contradicting such evidence and where a tribunal is entitled to accept evidence in accordance with the powers conferred upon under the *Labour Relations Act* it may act on any evidence which is logically probative. In *T. A. Miller, Ltd. v. Minister of Housing and Local Government et al.* [1968] 1 W.L.R. 992; [1968] 2 All E.R. 633 (C.A.) an inquiry was held by an inspector who admitted in evidence a letter. Lord Denning, M.R., stated the following at page 634:

The inspector relied on Mr. Fogwill's letter. So did the Minister in his decision. Counsel for the appellants said that they ought not to have relied

on it at all. It ought not even to have been admitted because it was hearsay. It was not on oath, no opportunity was given to test it by cross-examination, and it was objected to. Counsel said that in these circumstances, it was contrary to natural justice for it to be admitted.

In my opinion this point is not well founded. A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law (see *R. v. Deputy Industrial Injuries Comr., Ex parte Moore* (1)). During this very week in Parliament we have had the second reading of the Civil Evidence Bill. The Bill will abolish the rule against hearsay, even in the ordinary court of the land. It allows first-hand hearsay to be admitted in civil proceedings, subject to safeguards. Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it (see *Board of Education v. Rice* (2) and *R. v. Deputy Industrial Injuries Comr., Ex parte Moore* (1)). The inspector here did that. Mr. Fogwill's letter of Nov. 19, 1964, was put to the witnesses and they contradicted it. No application was made for an adjournment to deal further with it. In these circumstances I do not see that there was anything contrary to natural justice in admitting it.

16. The question of whether evidence is logically probative or, to use the expression in *Barber*, has cogency in law requires a consideration of *Barber* and the cases which have commented upon it. In *Barber, supra*, at page 252 (O.R.) and page 689 (D.L.R.), Jessup, J.A. after quoting section [now 44(8)(c)] stated:

By that clause the Legislature recognized that arbitrations will frequently be presented before arbitration boards by lay persons. Accordingly, it relaxed the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence to be adduced without objection. However, that provision does not relieve a board from acting only on evidence having cogency in law.

In *Barber* the Court was dealing with the question of whether the board of arbitration should have considered extrinsic evidence as to the proper interpretation of the collective agreement. The Court held that it should not, as the language of the collective agreement was unambiguous. The lack of cogency in law turned on the rule of contract interpretation as applied to the collective agreement. It may be argued that the Court held in *Girvin, supra*, that hearsay evidence has no cogency in law. However, though a reading of *Girvin* may suggest this interpretation, in our view, as stated previously, the real basis for the decision in *Girvin* was that the employee did not receive a fair hearing in the circumstances. This appears to be the interpretation adopted by the Divisional Court in *The United Glass & Ceramic Workers of North America et al. and Pilkington Brothers (Canada) Ltd. et al.* (1978), 89 D.L.R. (3d) 737.

17. Fortunately, the Court of Appeal has recently commented upon the phrase “cogency in law” in *Barber*. In *Noranda Metal Industries Limited, Fergus Division v. Local Union 2345, International Brotherhood of Electrical Workers and R.J. Roberts* [1984] CLLC ¶14,024, Dubin, J.A. stated at page 12,098:

As I read that judgment, all that Jessup J.A. stated was that the extrinsic evidence relied upon did not disclose any latent ambiguity and thus was irrelevant as an aid to interpretation. I do not read the judgment as holding that extrinsic evidence could not be resorted to if such evidence could be of assistance to an arbitrator in determining the true intent of the parties. Obviously if evidence is irrelevant, it cannot be relied upon even although it has been admitted. I think that is all that Jessup J.A. meant in stating that the provision of the *Labour Relations Act* referred to by him “does not relieve a board from acting only on evidence having cogency in law”. It is apparent that the present section 44(8)(c) is intended to permit an arbitrator to rely on relevant evidence even where such evidence is not admissible in a court of law.

The Board therefore finds that it has the power to accept and rely upon the evidence of Mr. Sherman with respect to the statements of the garage owner. The respondent did not adduce any evidence to challenge Mr. Sherman’s testimony.

18. The respondent, through its counsel, complained that the hearing ought to have been held nearer its home. It is the practice of the Board to consider all requests for a change in venue and to hold hearings outside Toronto when appropriate to do so. This practice is well known to counsel. The Board did not receive any request from the respondent for a change in venue. Reference to a possible change in venue was not made by counsel for the respondent until he was making representations to the Board after the evidence had been heard. Indeed, up until four days before the hearing, the Board had not received any communication from the respondent at all. Four days before the hearing the Board received a brief letter from counsel for the respondent stating that he acted for the respondent and that the respondent denied the allegations contained in the grievance and put the applicant to the strict proof thereof. The Board then sent a copy of this letter to the applicant and its counsel. The applicant set forth particulars of its claim against the respondent in a letter which accompanied the referral of grievance to the Board. The applicant set forth in its letter the article of the collective agreement which was allegedly violated, referred to each of the two jobs, the number of man-hours claimed for each job and the hourly wage and related payments rate which was applicable. Quite clearly, the respondent was made aware of the claim which was being made against it. There was no suggestion by counsel for the respondent that he either possessed or desired to call evidence which was contrary to the evidence given by Mr. Sherman and Mr. Sohlman. The Board notes that counsel for the respondent did not request an adjournment of the hearing.

19. Having regard to the uncontradicted evidence of Mr. Sherman and Mr. Sohlman, the Board finds that the persons who performed the work at the jobs in Kenora and Thunder Bay were not members in good standing of the United Brotherhood of Carpenters and Joiners of America. On the evidence before it, the Board finds that the respondent, in performing the two jobs, has violated articles 5.01(a) and 5.02(b) of the collective agreement at the jobs in the town of Kenora and the city of Thunder Bay in that it did not hire through the offices of the applicant and continue to employ employees covered by the collective agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America

when qualified employees in sufficient numbers were capable of performing the work required by the respondent.

20. The evidence established that the job in the town of Kenora required twenty man-hours of work at the hourly wage and related payments rate of \$21.07. With respect to the job in the city of Thunder Bay, while the Board is satisfied that the respondent erected the doors, it is not satisfied that the respondent attached the hardware. In these circumstances, the Board finds that the job in the city of Thunder Bay required forty-two man-hours of work at the hourly wage and related payments rate of \$21.07.

21. The appropriate remedy in this referral is to be framed in accordance with the principles referred to in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 48 D.L.R. (3d) 191 (Div. Ct.) and (1976), 57 D.L.R. (3d) 199 (C.A.). The remedy is the award of damages to the applicant in the amount equal to the amount which ought to have been paid to members of the applicant had they performed the work on the two jobs. The sum of sixty-two man-hours at the hourly wage and related payments rate of \$21.07 which equals \$1,306.34 shall be paid forthwith by the respondent to the applicant in trust for distribution to the affected parties who were denied an opportunity to work on the two jobs.

1649-83-U United Steelworkers of America, Complainant, v. Shaw-Almex Industries Limited, Respondent

Damages — Duty to Bargain in Good Faith — Intimidation and Coersion — Unfair Labour Practice — Whether notices posted by employer intimidation or coersion — Employer withdrawal of wage offer after months of strike not unlawful — Employer failing to explain delay in response to fresh union proposals — Bad faith bargaining found — Union not seeking explanations for employer conduct at bargaining table — Precluded from raising same before Board

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *C. M. Mitchell and N. Carriere for the complainant; J. Heather, T. Churchmuch, A. J. Lenczner, Q.C. and J. Shaw for the respondent.*

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER J.D. BELL;
October 10, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act*. The complainant alleges violations of sections 3, 15, 64 and 66 of the Act. The major complaint is that the respondent has failed to bargain in good faith with respect to the renewal, with amendments, of the parties' last collective agreement, which expired January 31, 1983. Procedural matters which arose during the hearing of this complaint are the subject of two previous decisions

reported at [1984] OLRB Rep. January 109 and [1984] OLRB Rep. April 659. This decision deals with the merits of the complaint.

2. The respondent manufactures equipment and machinery used in splicing and repairing conveyor belts used in the mining industry. Its market is international. Its plant is located in Parry Sound, Ontario. The respondent is owned by Doris Shaw and her husband James. Each of them plays a senior management role. Perceptions differ as to their relative importance when it comes to decision-making in industrial relations matters. Their son, John Shaw, is employed in the business. He is responsible for sales and marketing in South East Asia, and in that capacity reports to the Sales Manager, Mr. Kramer. Since 1981, he has also had responsibility for industrial relations. In that regard, he reports directly to his parents. In his view, his parents make industrial relations decisions jointly. The complainant's perception is that Doris Shaw exercises the ultimate authority in labour relations matters.

3. The complainant was certified in 1974 to represent a plant unit of employees of the respondent. When the last collective agreement expired in January of 1983, there were forty employees in that unit, six of whom were on layoff. That collective agreement had been the fourth collective agreement entered into between the complainant and the respondent. There had been no resort to economic sanctions by either party during the negotiation of the first and last of those four collective agreements. The complainant engaged in lawful strikes during the negotiation of the second and third agreements. The first of those strikes lasted six weeks, the second lasted five. In each of those four sets of negotiations, the respondent retained labour relations professionals to advise it and act as its spokesman. The negotiations which led to the fourth agreement involved a number of meetings, during which progress appeared to the union to have been made concerning "language" changes sought by the union on so-called non-monetary provisions of the previous agreement. At the conclusion of those negotiations, however, the respondent only agreed to a one year extension of the previous agreement, with some changes in wage and benefit amounts, but no changes in contract language. Many of the complainant's initial bargaining goals were left unfulfilled in the settlement to which it ultimately agreed at that time. There was no complaint that the respondent's bargaining had been in bad faith on that occasion. Whatever difficulties there may have been between the complainant and the respondent in the negotiation or administration of the parties' first four collective agreements, there is no evidence before us to suggest that at anytime before the events in question here the respondent had refused to recognize or sought to undermine the complainant's bargaining rights or otherwise displayed "anti-union animus" as that phrase is understood in this Board's jurisprudence.

4. As noted earlier, this complaint focuses on the parties' bargaining with respect to a fifth collective agreement, the fourth having expired January 31, 1983. The commencement of those negotiations was discussed at a labour-management meeting in December, 1982. The union gave notice to bargain on January 5, 1983. On January 20th, Doris Shaw wrote to Norman Carriere, the staff representative who would be acting as the union's spokesman in the negotiations, to advise him that arrangements had been made to meet on January 27th and 28th. While these dates had earlier been proposed by the union, they were no longer available for Mr. Carriere. He telephoned Mrs. Shaw to tell her that and discuss alternate dates. In response, John Shaw contacted Homer Seguin, the union's area representative for North Eastern Ontario and Carriere's immediate supervisor. Shaw pressed Seguin for an early start in negotiations; Seguin, in turn, pressed Carriere to make himself available for the two days set aside by the respondent.

5. The union's proposal for renewal of the collective agreement had been forwarded to the respondent under cover of a letter dated January 18, 1983. The union proposed a number of changes to the language of the non-monetary provisions of the collective agreement. Some were said to be merely "housekeeping", of which the clearest example addressed the fact that the existing agreement contained two articles numbered "8.03" and proposed a renumbering to eliminate the duplication. Many of the language proposals had been the subject of discussion in the previous set of negotiations. As matters developed, some of the most critical proposals concerned seniority and its application to temporary layoffs and the extent to which any factor other than seniority would govern in layoffs. This was not the only serious issue raised by the proposals. We do not consider it necessary or desirable to review each of the proposals in detail or trace the way with which each was dealt during the initial and subsequent negotiation meetings. The fact that we do not refer to those proposals in detail should not, however, be taken as reflecting a judgement about their importance to either party, nor should the reference in this decision to any particular proposal be taken as reflecting a judgement that that proposal was more worthy of consideration by the parties than others. Major elements of the union's initial monetary proposals were vague, as would normally be expected at this stage of negotiations. These included "a Pension Plan for all employees (details to be negotiated)", "substantial wage increase to all classifications. . ." and "review classifications and Labour Grades". The union was asking for a one year agreement.

6. The parties' first meeting was on January 27th, 1983. Norman Carriere was spokesman for the union bargaining committee. He had been staff representative assigned to this bargaining unit since some time during the currency of the collective agreement which expired in January, 1982. This was his second set of negotiations involving this company. John Shaw was the respondent's spokesman. The respondent did not employ a labour relations professional as its spokesman, as it had on previous occasions. Up to this point, John Shaw's labour relations experience consisted of participation in labour-management meetings during the term of the expiring collective agreement. He had been an observer at only two of the many meetings which took place during the 1982 negotiations.

He told the union that the respondent had reviewed the union proposals. He spoke about the company's economic difficulties. The economic context was a period of recession. The company had received no orders since August of the previous year. It needed to remain competitive. It was trying to survive. It wanted to treat its employees as best it could, but was not prepared to waste a lot of time on bargaining as it had been done in the previous set of negotiations. The company was satisfied with the present language of the collective agreement, and said its proposal was for a one year extension of that agreement with a wage freeze. Carriere reviewed the union's language and non-monetary proposals in detail, outlining the reasons for each. After Carriere's presentation, the company maintained its position that the language should remain unchanged, but said that it would be willing to look further at monetary issues. Carriere took this to mean that the union would have to abandon its non-monetary proposals before it could learn what the company's monetary proposal was. John Shaw felt he was signaling a preparedness to move on monetary issues without necessarily having to first resolve the non-monetary ones. At some point in the discussion, Carriere mentioned that conciliation might become necessary. The meeting ended without either party having moved off its initial position.

7. Although the respondent had not retained a labour relations professional to act as its spokesman in the negotiations, it did consult from time to time with James Heather and Terry Churchmuch at the Central Ontario Industrial Relations Institute; they had each been involved in earlier collective agreement negotiations on behalf of the respondent. Following the meeting of January 27, 1983, John Shaw contacted Mr. Heather and instructed him to

file an application for the appointment of a conciliation officer. Heather did so, completing the standard form on the basis of information supplied by Shaw. Much was made of some inaccuracies in the information contained in that application. We are satisfied that they reflect genuine misunderstandings by John Shaw which have no significance other than to highlight his admitted inexperience in labour relations matters. Nothing in these inaccuracies was sufficiently troubling to the complainant as to become the subject of any discussion at any of its subsequent bargaining meetings with the respondent.

8. As a result of the respondent's application for conciliation, Mr. J. Leonard was appointed conciliation officer on February 28, 1983. A first conciliation meeting was set for March 11th, and rescheduled to March 27th.

9. On March 7, 1983, a notice was posted on the respondent's bulletin board advising the employees that it was considering establishing a sales and servicing facility in the United States, and that people would be brought in to the plant for training. On March 11th another notice went up, saying that certain people would be coming to the plant for training in connection with the earlier notice. Carriere heard about both notices from employees in the bargaining unit who feared that the respondent's plant would be relocated or that they would be obliged to train persons outside the bargaining unit to do service work which they had previously done at the plant. At the meeting of March 27th, Carriere expressed concern about the effect the March 11th notice had had on employees. He did not, however, seek any further information about the plans referred to in the notices. The union's complaint alleges that the posting of these notices amounted to intimidation or coercion of the sort proscribed by section 64 and 66 of the Act. Curiously, during his cross-examination of Carriere about the effect these notices had had on employees, Mr. Churchmuch put it to Carriere that a belief that the company was moving would not have been totally bad, as it might have led employees to agree to settle a contract. In contrast to that suggestion, it was John Shaw's evidence that the notices were put up purely for information purposes in accordance with the company's standing practice of keeping employees informed in this manner of company's developments; he said that the timing of the announcements had nothing to do with the bargaining process. The complainant led no evidence to show that the content of the notices was untrue or that company developments had not previously been the subject of such notices. Despite Mr. Churchmuch's peculiar question to Mr. Carriere, we accept Mr. Shaw's evidence with respect to these notices, and conclude that the posting of them was not in violation of the *Labour Relations Act*.

10. At the meeting of March 27th, the conciliation officer suggested that the union go over its proposals in the presence of the company. Carriere did that. The conciliation officer then met with the parties separately. By the end of the day, the company's position on "language" or "non-monetary" issues was unchanged. It had, however, put forward a fresh monetary offer. This involved a 3 percent wage increase to be effective upon shipping a large piece of machinery (an event which the company hoped would occur in May or June) or on July 1st whichever first occurred, and a further 3 percent wage increase to be effective October 1, 1983. The complainant did not accept that proposal, and made no fresh proposal of its own. The meeting ended without agreement. A "no board report" issued on April 5, 1983. The complainant's bargaining committee met with the membership April 14th. The membership rejected the company's "three and three" offer, and voted to strike.

11. On April 21, 1983, the parties met with Mr. M. C. Skinner, a mediator from the Ministry of Labour. The parties met face to face at the beginning of the meeting, and it opened with a review by Mr. Carriere of the union's position. During those remarks, Mr. Carriere said

that the respondent was the worst company he had ever dealt with or seen. He said that the company had "dumb management", and made it clear that the language of the collective agreement might not have been an issue except for the kind of management the company had and the way it applied the collective agreement. These general criticisms of the company were not the only observations Carriere made at this meeting. He again offered a specific rationale for each of the union's proposals, albeit in somewhat less detail than at the conciliation meeting. Neither party had changed its position when this meeting ended. Employees in the unit affected went on strike the following day, April 22, 1983.

12. When the meeting of April 21st ended, the parties seemed to have had a common understanding that any further meetings should be arranged through the mediator, Mr. Skinner. Skinner called Carriere about one month later to find out if the parties had had any meetings of their own. Carriere reported they had not. Carriere was not concerned about this; he expected the strike to last about six weeks before there would be further developments. In mid June, Carriere telephoned John Shaw to discuss a recent released arbitration award involving these parties. Carriere says that he told John Shaw in this conversation that he, Shaw, ought to contact Mr. Skinner and get back to the bargaining table. He says Shaw replied that things were okay in the shop, and that he did not see any change in the union's position. Carriere did not suggest that there had been any change in the union's position and, as he says, "I didn't push." Carriere says he again spoke by telephone to John Shaw concerning the arbitration award at the end of June, and again said that Shaw should contact Skinner. Shaw recalls only one telephone conversation about an arbitration award. He does not recall any suggestion that he contact Skinner. He does recall that Carriere gave no indication that the union's position in bargaining had changed in any way, and in that respect his evidence is uncontradicted. Carriere spoke to Skinner himself and expressed the desire for further meetings. John Shaw says he heard from Skinner from time to time; the first time Skinner suggested a further meeting, however, was in July. The dates Skinner proposed fell in Shaw's vacation period. Shaw proposed dates following his vacation. Those dates fell within Skinner's vacation period. They left it that Skinner would contact Shaw again near the end of August, when Skinner returned from his vacation.

13. As tends to be the case in matters such as these, the effects of, and interest in, the strike extended beyond the immediate parties. In mid August, Mr. Carriere became aware of a letter dated August 3, 1983, from Stan Darling, member of parliament for Parry Sound-Muskoka, to Ken Hunter, Reeve of the Township of Foley where, as we understand it, the respondent's plant is located. Mr. Darling's letter purports to respond to a letter from Reeve Hunter of July 28, 1983, on the subject of the Shaw-Almex strike. Mr. Darling's letter sets out information he says he received from "Mr. Shaw" concerning existing terms and conditions of employment and the course of negotiations to date. Among the several items referred in Mr. Darling's letter, there is a reference to Mr. Shaw's as having been in touch with the Ministry of Labour and a meeting having been set for August 23rd. There is also a suggestion that "the employees will not even talk wages". The respondent's representative objected to the introduction of Mr. Darling's letter. We initially upheld the objection. The complainant then established that Mr. Carriere had responded to Mr. Darling's letter with a letter of his own to Mr. Darling and, further, that Carriere's letter had been reproduced in the local newspaper as had portions, if not all, of Mr. Darling's letter. Mr. Carriere's letter having been accepted in evidence as Exhibit 15, we reconsidered our earlier ruling of the admissibility of Mr. Darling's letter, and ruled as follows:

We will accept the letter of M. P. Darling which is referred to in Exhibit

15. We can give it no weight whatsoever as evidence of the company's position, or as evidence of what was said by the company to Darling. However, it may be relevant to demonstrate the union's state of mind — a state of mind of which the employer was aware because, as counsel for the respondent conceded, both letters were published in the local press and did come to the attention of the respondent. Without ruling whether the letters or the employer's response to them are "improper or irregular conduct" required by Rule 72 to be particularized in advance of the hearing, counsel for the respondent told us he had been aware since November 22nd that the complainant sought to rely on them. There is no surprise to remedy.

As our ruling indicates, Mr. Darling's letter is made significant by Carriere's reply of August 17th. We do not propose to reproduce that three page letter in full. The following extracts will be sufficiently illustrative for our purposes:

... I fell obligated to reply on behalf of the workers on strike at this plant and try and set the records straight.

... I was upset that, as an elected member of Parliament, who claims [sic] does not want to take sides, that you would write such a letter before first contacting all of the parties involved in this dispute.

... before accepting a statement from Management, "that the employees have not been willing to negotiate", you ought to have tried to confirm that statement with Mr. Skinner and myself. The truth is the Union has always been willing to meet and that it is the Company who are not interested in coming to the bargaining table.

Mr. Shaw obviously failed to mention to you that his Company refused to discuss any contract language, especially in the area of seniority rights and job security. The Company's application of the present language and their philosophy that an employee's responsibility is first to the Company and not his family makes it impossible to live with the present language.

At this point in the letter, Carriere refers to the reasonableness of two major union proposals, the proposed seniority provisions and the requirement that certain work be returned to the bargaining unit. He goes on to say:

I was also surprised to hear that Mr. Shaw made a new offer to you and not to the parties involved in this dispute.

Mr. Darling's letter had described existing benefits as including the right to four weeks vacation after ten years. Carriere's letter describes this as a new company proposal. Mr. Darling's letter said that Shaw-Almex benefits were more generous, in Shaw's opinion, than those provided by C.I.L., another employer in the area. Carriere's letter sets out the new company proposals that would have to be made in order to provide benefits more generous than those at C.I.L. Carriere then goes on to say:

The last Company offer was in the amount of 2 3/4% over the year and their new offer, through you, is 5 to 6%.

I doubt very much that the Company is prepared to make such an offer and believe that Mr. Shaw is doing to you what he has been doing to his employees for years.

Mr. Carriere's letter bears the following notation below his signature:

xc to:K. Hunter
 B. Kerr
 The Parry Sound North Star
 A. Skinner
 The Beacon — Parry Sound
 Elie Martel MPP — NDP
 Ed Broadbent MP — NDP Leader
 Homer Seguin

This long list of persons to whom Carriere copied his letter does not include Shaw-Almex Industries Limited or any member of its management. Carriere did not speak or write to John Shaw to find out which "Mr. Shaw" had spoken to Mr. Darling or to obtain clarification of any concerns he had as a result of reading Mr. Darling's letter. When he became aware of these letters, through the press, John Shaw similarly made no efforts to clarify the situation.

14. In late August and early September Carriere spoke to Ray Illing, the Director of the Ministry of Labour Conciliation & Mediation Service, to try to arrange further meetings. Mr. Illing's office had been speaking with the respondent and James Heather. As a result of those discussions, a meeting was arranged for September 16, 1983, in Mr. Illing's office. The meeting was confirmed by letter from Heather dated August 29th, indicating that "the principals" of the respondent would be meeting with Mr. Illing at that time, and that Heather would be attending with them. Heather testified that he understood the principals of the respondent to be James and Doris Shaw. James Shaw went with Heather to that meeting. The result of the meeting was that Heather gave Mr. Illing an undertaking that if the union prepared fresh counter-proposals, he would meet Carriere and go through them and see whether fresh ideas would work. Illing then spoke with Carriere. A meeting was arranged for September 26, 1983. Heather, and through him the respondent, understood that a fresh union position would be presented at this meeting.

15. Heather and Carriere met in Toronto on September 26th. The mediator, Mr. Skinner, was present. Heather told Carriere he had no authority to negotiate, but only to listen. Carriere presented the union's new proposals; he and Heather discussed them. Heather said nothing about whether or not the company's pre-strike offer was still open for acceptance. There is no suggestion that Carriere asked about this, nor that the union had any interest in making an agreement on the basis of that offer. Heather did mention that the company position might be one of requiring restraint, and said that in that regard there was some question whether the company would continue its commitment to its existing benefit package. No particular part of the package was mentioned as being under review, and neither of the participants pursued this issue further. Without committing the company to any position on the union's new proposals, Heather told Carriere that they warranted a response by the company. Carriere was generally happy with Heather's response. Near the end of the meeting, however, Carriere told Heather he was considering filing unspecified charges against the company. He related this to problems he thought the company had caused with respect to workers' U.I.C. claims and charges he thought the company might have laid against him. Another reason he gave Heather

for filing charges was that he intended to “frustrate the old bitch”. The reference was to Doris Shaw. When he testified before us, Heather noted that the filing of charges had had the effect Carriere had intended.

16. Heather wrote to Carriere on September 27th:

Further to our mediation meeting yesterday with Mr. Skinner from the Ministry of Labour, this will acknowledge receipt of your proposals for settlement which I am forwarding to the Company for consideration.

As you are aware, the appropriate principals of Shaw-Almex Industries Limited will be out of the business for a short while.

I have advised the Company that a response to your proposal would be in order and possibly a meeting for such purpose can be arranged through Mr. Skinner.

17. John Shaw did not attend the meeting of September 26th. He knew fresh union proposals would be presented, but felt it was more important to prepare for a month-long business trip to South-East Asia which was to start September 28th. He left on that trip without making any arrangement for the continuation of negotiations during his absence. However, the reference in his letter to the appropriate principals’ unavailability was, so far as Heather was concerned, to Doris Shaw’s anticipated absence. At that point in time he had been told that she planned a short business trip to Europe. We accept John Shaw’s evidence that he told Heather about his trip too, but it is apparent Heather did not regard that as critical. He obviously thought of Doris and James Shaw as the key participants in formulating a company response, and felt a response should be forthcoming promptly. At their meeting with Illing, Heather had told James Shaw that the involvement of Heather’s firm was to continue, fresh union proposals would have to be responded to.

18. The company did not respond promptly. September ended without further word to the union. October days passed and turned into weeks, and still there was no company response. Striking workers reported to Carriere that they saw Doris Shaw going to and from the plant each day. There was no sign of any business trip to account for a delayed response; as it happens, her business trip had been cancelled. The strike was six months old when the complainant filed this complaint on October 21, 1983, and there still had been no company response to the union proposals presented September 27th. There is no evidence of any company effort to respond, not even to arrange a date for a meeting, until after John Shaw returned from South-East Asia; there is no explanation for this delay except John’s absence abroad. Once John Shaw returned, Mr. Skinner was able to arrange a meeting for November 24th.

19. The parties met with Mr. Skinner on November 24th, the first day of hearing in this matter having been completed on November 22nd. Heather was now spokesman for the company; John Shaw accompanied him. Carriere was again spokesman for the union bargaining committee. Heather said that the strike had hurt the company, it had had difficulties with its bank, it did not have a lot of new orders, it had lost business and the recession was killing its markets. As a result, it was looking at suspending some of the benefits provided for in the expired contract. The company was prepared to and did discuss “non-monetary” issues. Some of these were disposed of in one way or other. The seniority matter was still a major sticking point. The company proposed looking at a quality circle approach as an alternative; the union was

not interested in exploring such a radically new proposal at that stage in the negotiations. The company made it clear that a wage increase was no longer part of its proposals. Carriere was surprised by this. The union made a monetary proposal of its own, but from the company's response to that proposal, Carriere took it that they had heard the company's final position. When the meeting ended, the parties were far apart on both monetary and non-monetary issues.

20. The position the company took at the November 24th meeting became the subject of additional charges in these proceedings. In his letter of January 3, 1984, counsel for the union alleged that the respondent had sought to avoid a collective agreement by making new demands for concessions on benefits and by withdrawing from its previous position on wages. The hearing of this complaint continued on January 10 and 12, 1984, and adjourned to February 3rd. During settlement efforts on January 12th, at the urging of the union and management representatives on this panel of the Board, the parties agreed to meet and bargain again before the next hearing date, and went to speak to Mr. Illing to arrange dates on which Illing might be available to assist them. Mr. Illing was not in his office at that time, so the parties spoke to Mr. Grossman of his office about Mr. Illing's availability. January 23rd and 24th were agreed upon as dates on which the proposed participants were all available. For the company's part, the proposed participants were John Shaw and T. Churchmuch, a colleague of Mr. Heather's who had served as the company's representative in these proceedings since November 22, 1983, had been involved in the negotiation of an earlier collective agreement between the parties and had been involved in the periodic negotiations in which the parties had engaged for various periods on days scheduled for the hearing of this complaint. John Shaw was to accompany Churchmuch, and he was to come with the power to make decisions. Carriere and the bargaining committee were to be present, and there was some suggestion that Homer Seguin would join the union delegation.

21. Heather, not Churchmuch, accompanied John Shaw to the meeting of January 23rd in Toronto. Carriere and his committee were present; Homer Seguin was not. Mr. Illing was occupied elsewhere; Mr. Grossman and Mr. Skinner met with the parties. The meeting began around two o'clock in the afternoon. The mediators first met with the parties separately. They all met face to face shortly before six o'clock, when the company presented a written proposal covering certain of the outstanding items. The union participants retired to consider their position, and then spoke to the mediators. There was a further face to face meeting at about seven o'clock, at which the company presented further proposals in writing. The union delegation retired again, then returned to say they felt it would be best to break for the day at this point and continue in the morning. Heather then announced that he was not prepared to continue the following day as he had another commitment. This was the first that the union knew that the company would not follow through on the arrangements agreed upon earlier. Carriere met alone with Heather and the mediators. He asked for a full proposal from the company to take back to the members. Roughly two hours later the company presented a further document which, together with the two earlier documents, was said to represent the company's final offer. This offer included two wage increases of three percent each, effective on dates later than those originally proposed in March, 1983. There was no further discussion. Carriere and his committee took the offer to a membership meeting on January 31, 1984. It was rejected, and Carriere so advised Skinner and the company by letter dated February 1st.

22. On February 21, 1984, Heather wrote to Carriere enclosing draft Minutes of Settlement said to reflect the terms offered by the company at the meeting of January 23rd. The letter stated that that offer was still open for acceptance. Neither the Minutes of Settlement nor the written offers presented January 23rd made any reference to certain items on which

the union thought it had secured the company's agreement in the meeting of November 24th. In the hearings before us, the union argued that this reflected an unexplained retreat from which we should draw an adverse inference about the company's motivation in bargaining. The company says that the documents of January 23rd focused on issues which were still outstanding, not on issues already settled, and that the omission of the latter in the Minutes of Settlement was an oversight. It is not clear when the union first noticed the omission. There is no evidence that the union sought clarification or brought the omission to the company's attention before raising it in these proceedings as a further allegation of bad faith bargaining.

23. The next hearing date after January 12th was February 3rd. That day was consumed with procedural questions arising out of a fresh allegation by the complainant that the respondent was providing strike replacements with wages and benefits greater than those being offered to bargaining unit employees at the bargaining table. The result, *inter alia*, was an order requiring production of certain records of the respondent: see, [1984] OLRB Rep. April 659. When the Board's hearings in this matter continued in May, we heard a great deal of evidence and argument about these records and their meaning. Much of the detailed evidence concerning individual office employees and strike replacement employees was heard in camera on the unopposed joint application of the parties. We do not propose to recite that evidence in detail in this decision. An overview will suffice. The respondent continued its operations during the strike, on a reduced scale. Office and managerial employees did production work in addition to their office functions. Until about November, they were paid for the same number of hours per week and at the same salary as had been the case before the strike began. Starting in November, they began to receive higher weekly gross pay, which John Shaw explained was due to their being paid for the number of hours they were actually working. He says this is not because they were working significantly more hours than they had been in the early months of the strike, but merely because they were being paid for their overtime hours for the first time. Their regular hours of work were also increased from 39 to 40 hours per week around this time, and their gross pay increased accordingly.

24. The company began hiring strike replacements when the strike began. For the first six months, payroll records for these employees were maintained in a manual system. Thereafter, the records were incorporated into the computerized payroll system used for permanent employees. The records show that the basic wage received by striking employees was, in some cases at least, more than the wage they would have received under the expired collective agreement. On the other hand, they did not receive any benefits other than those required by statute. When the value of the additional benefits contemplated by the expired collective agreement is taken into account, it becomes unclear whether strike replacements were at any relevant time receiving more in wages and benefits than had been offered at the bargaining table. If that did occur, and we make no finding to that effect, the difference was a subtle one which did not continue after the meeting on January 23rd. There is certainly no evidence that this became the subject of discussion or questioning at the bargaining table, or that the differences were communicated to the striking employees in any way which would have suggested to them that they could earn more by abandoning collective bargaining.

25. Section 15 of the *Labour Relations Act* provides:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The scope of the duty imposed by this section has been reviewed in a number of this Board's decisions. The basic themes emerge in this passage from *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65:

13. The scope of the duty to bargain in good faith has been fairly clearly outlined in three recent decisions of this Board. *DeVilbiss (Canada) Limited* [1976] OLRB Rep. March 49; *Canadian Industries Limited* [1976] OLRB Rep. May 199; *Graphic Centre (Ontario) Inc.*, [1976] OLRB May 221. As was stated by the Board in *DeVilbiss (Canada) Limited*, *supra*:

The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.

The Board necessarily looks to the manner in which the parties conduct their negotiations to determine whether a breach of the duty has occurred. It will infer from their conduct whether there has been demonstrated a refusal to recognize the status of the other party or an unwillingness to engage in the open and rational discussion that is sound collective bargaining relationship.

14. It should be stressed, however, that section 14 of *The Labour Relations Act* is not intended to redress any imbalance of bargaining power that may exist between the parties. A party whose bargaining strength allows it to force the acceptance of hard terms at the bargaining table does not thereby bargain in bad faith. The very word "bargain" presupposes that the parties will seek to maximize their own best interests. Hard bargaining, albeit ruthless, is not bad faith bargaining.

In *Canadian Industries Limited*, [1976] OLRB Rep. May 199, the Board discussed the duty in these terms:

15. ...satisfaction of the duty to bargain in good faith depends on the manner in which negotiations are conducted and not upon the content of the proposals brought to the bargaining table. To take the latter approach would mean that the Board would be put in the position of an interest arbitrator, having to assess the relative merits of the bargaining proposals of both parties.

17. Recognition requires each party to approach collective bargaining with the objective of entering into a collective agreement. This means that a failure to reach a collective agreement cannot be motivated by an unwillingness to recognize the other party. The requirement to recognize the other party does not mean, however, that a party can establish failure to bargain in good faith by simply proving that its terms were not accepted by the other party. This type of proof, going to content of the proposals rather than to the conduct of the negotiations, would be insufficient to establish a lack of recognition.

18. The conduct of the negotiations is not only judged in terms of mutual recognition but also in terms of quality of discussion. This latter factor is somewhat broader in its application, extending to those situations where there may be present the common objective of entering into collective agreement, but where there is absent any willingness to discuss how that common objective might be reached.

19. The requirement of rational discussion imposes upon the parties a duty to communicate with each other, recognizing that proper collective bargaining depends upon effective communication. Although a failure to communicate might not appear to be the same kind of wrong as an unwillingness to recognize the other party, it does, in fact, have a very serious effect on the collective bargaining process as a whole. The breakdown of established bargaining relationships, because of an unwillingness to engage in full discussion with the other party, is likely to lead to more frequent resort to economic sanctions, and to greater dissatisfaction with the collective bargaining process. The obligation to bargain in good faith recognizes the importance of collective bargaining as a structure within which a full dialogue can be conducted between a trade union and the employer.

While they heralded a more expansive remedial approach to violations of the duty to bargain in good faith, the Board's decisions in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 and *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397 reiterated the cautious approach this Board must adopt in assessing any claim that an employer has engaged in "surface bargaining". In *Radio Shack*, *supra*, the Board observed:

66. . . . The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See *York Regional Board of Health*, (1978), 18 L.A.C. (2d) 255 at 263 (Adams).

67. Thus, from an employee viewpoint the right to engage in collective bargaining is not a right to achieve the terms of employment employees may wish. It is simply an opportunity to combine together to try and achieve their needs with the possibility that economic realities will dictate quite a different result in any particular situation. This perspective of the bargaining duty was explained by the Board in *CCH Canadian Limited* [1974] OLRB Rep. June 375 at page 381 in the following way:

"There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith. (see *Regina ex. rel. Hearn v. Norfolk General Hospital* (1957) 119 C.C.C. 290 (Ont. Mag. Ct.)). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application."

68. Of course, difficulties may arise in trying to distinguish those actions of an employer that are properly characterized as "hard bargaining" from conduct designed to destroy the union. And first contract bargaining presents the Board with no greater challenge in this respect.

69. In order to make necessary but sensitive assessments of bargaining conduct the Board must assess the totality of a collective bargaining relationship. For example, the occurrence of flagrant employer unfair labour practices at the same time the parties are engaged in collective bargaining may belie an employer's claim that a negotiating position is merely hard bargaining with a trade union unwilling to accept its lack of negotiating "clout". Or patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer's desire to embarrass the union and encourage its abandonment by the employees. The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of. On the other hand, this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement — a commitment which is more and more self-evident as parties proceed together beyond their first collective bargaining agreement. Too penetrating a review by this Board will only insert it as a third party in the bargaining arena to be tactically used by the negotiators, diverting their attention from the principal task at hand. . . .

The Board made similar remarks in *Fotomat Canada Limited*, *supra*:

26. . . . The duty to bargain in good faith and make every reasonable effort to make a collective agreement must be applied in the practical context of collective bargaining. However unpleasant the fact, collective bargaining is inevitably a power relationship. The legislation assumes that the resolution of differences between union and management rests on the balance of the relative bargaining power of the two parties. If bargaining power is defined as the ability to secure another's agreement on one's own terms, there is nothing in itself unlawful about either an employer or a trade union wanting its demands met and bargaining to achieve this end. The result may be

perceived as unfair, unnecessary, and selfish, but the Ontario Labour Relations Board has not been given the role of interest arbitrator. See *Ottawa Journal*, [1977] OLRB Rep. June 309 at p. 323, para. 57. The Board has, however, said it will scrutinize the first contract relationships that come before it to sort out hard bargaining from unlawful conduct. An employer cannot use his raw bargaining power for the objective of operating without a trade union. On the other hand, no newly certified bargaining agent can afford to lose sight of the fact that collective bargaining remains a power struggle. See *Goldraft Printers*, [1980] OLRB Rep. April 448 at p. 456, para. 26.

27. The Board has also said that it will assess the content of bargaining postures in making judgments under section 14 (*Goldraft Printers*, *supra*, para. 20), but this assessment too must be made against the reality of collective bargaining outlined above. Where a trade union impugns an employer's position on one particular provision or on its tough overall posture at the bargaining table and this alone, the Board has to be as careful to avoid being used by that trade union to supplement its bargaining power as we must be cautious to ensure that the hard bargaining does not have as its purpose, the destruction of the trade union. While it may be that a bargaining agent has its "heart set" on a particular provision as a matter of principle, it must still have the bargaining power to achieve this end. Moreover, tactical errors can have a dramatic effect on a party's bargaining power or lack thereof and, in the words of a relevant fairy tale, this Board cannot be expected "to put all of the pieces back together again." See *Ottawa Journal*, *supra*, para. 59. Complainants must realize that section 14 allegations will be considered in the light of the conduct of both parties and the remedies requested must bear a direct relationship to the breach established as a matter of causation. The Board must be particularly sensitive to the reality of collective bargaining in prolonged strike bound negotiations where interpersonal conflict can become quite embittered and where the temptation to turn to the Labour Board to supplement a party's bargaining power may be great. See *Ottawa Journal*, *supra*. It has long been recognized that the content of the bargaining duty may change as a bargaining continues. Strikes can be lost as well as won. See *New Method Laundry and Dry Cleaners* (1957), 57 CLLC ¶18,059.

26. Whatever else might be said about the bargaining which preceded the strike, we can find no illegality in the parties' behaviour in that time frame. Each of the parties took an opening position from which some retreat was possible, then quickly set a climate in which it became difficult for the other to make any concessions. The insensitivity of the company's rigid opening position was matched by the union's unpalatable position that language changes were necessary because the Shaws were "dumb" managers. Each adopted positions which the other took as insults. This provides part of the context in which later events must be assessed. The history of the parties' relationship is another part of that context. These parties had an established relationship; the collective agreement provisions sought to be changed were provisions to which both parties had once agreed.

27. Counsel for the complainant concedes that nothing in the respondent's behaviour prior to June is, by itself, suggestive of improper motive on the respondent's part. He acknowledges

that in these circumstances the union could not insist that the respondent meet with it again, unless it first made a significant reduction in the proposals that it last made to the company prior to the onset of the strike": see *Artistic Woodwork Company Limited*, [1973] OLRB Rep. Nov. 566 at paragraph 11. He submits that condition was met in September at the conclusion of Heather's meeting with Carriere, and that the respondent's failure to meet promptly in response to the union's fresh proposals violated section 15. We agree. The only explanation offered for the delay in John Shaw's business trip. There is no suggestion that Doris and James Shaw were both incapacitated during the five or six week period following the presentation of the union's new proposals. There is no reason why one or other of them could not have made the necessary effort themselves, or instructed someone else to take the necessary steps as their representative. As the Board observed in *Fotomat Canada Limited*, *supra*, at paragraph 29:

An employer must make himself reasonably available to bargain and if he selects a representative for bargaining purposes who is in fact too busy to take on the assignment, he puts himself in jeopardy of violating section 14 [now 15].

28. The respondent's monetary position in the November meeting cannot fairly be described as a withdrawal of an outstanding offer. The union had rejected the offer in question by commencing its strike. The union could hardly expect that the offer it had so rejected would still be open for acceptance after months of strike. The company did adopt a changed position. In *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136, the Board noted that there is nothing per se illegal about a change in position:

7. We start with the long held view of this Board that "the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment." (See the *DeVilbiss (Canada) Ltd.*, case, [1976] OLRB Rep. March 49 at para. 13.) This Board recognizes the concept of voluntarism as relied upon by the respondent [sic] company. As a general proposition a party is free to take whatever position best satisfied its self interest providing it maintains the intention of concluding a collective agreement. The difficult cases arise where a party tables a position which it maintains is legitimately in its self interest but which the other side maintains is destructive of the process or designed to avoid a collective agreement and to undermine the trade union. In the *Pine Ridge District Health Unit* case, [1977] OLRB Rep. Feb. 65 the Board noted:

"Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining . . ."

(See also *Toronto Jewellery Manufacturers' Association* [1979] OLRB Rep. July 719).

However, the Board's views as expressed in the *Pine Ridge District Health Unit case, supra*, cannot be taken as a carte blanche to alter one's bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making framework necessary for collective bargaining would be contrary to section 14 of the Act. (See the *Graphic Centre (Ontario) Inc. case*, [1976] OLRB Rep. May 221.) Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to changes in relevant conditions, a party which alter its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

The respondent's change of position on wages and benefits followed a number of months of strike, during which its financial position underwent changes. The respondent says those changes, as they appeared to it at the time, prompted its changed position on economic issues at the bargaining table. On the basis of financial information unearthed by subpoena and cross-examination during the hearing of this complaint, counsel for the complainant argues that things were not as bad as the respondent says they seemed, criticizes the respondent's failure to make a more elaborate and detailed financial presentation at the bargaining table and submits that the respondent has failed to prove to us that in November, 1983, it could not afford to maintain the existing benefits and pay the wage rates it had offered in March and April before the strike began. The issue is not whether the company could have afforded a more generous offer, any more than it is whether the union could have lived with a more modest one. The simple answer to the argument about the amount of financial data offered at the bargaining table is that the union did not ask for any more. There is nothing to suggest that the company was withdrawing from a position which it had reason to believe the union was about to accept. The new position did not create for the employees a Hobson's choice of the sort with which the Board was concerned in *Wilson Automotive (Belleville) Ltd., supra*.

29. We do not propose to comment on each of the events which counsel drew from the evidence and held up as representing part of a pattern from which he submitted we would divine in the respondent a desire to avoid making a collective agreement. We will comment on some. There is the matter of the letters published in the local press. Counsel says the respondent's failure to clarify the concerns raised in Carriere's letter to Darling represents an inappropriate indifference to the bargaining process. We are obliged to observe that the *Labour Relations Act* imposes no obligation to bargain in or through the press. The most direct and appropriate way for Carriere to explore any concern he had about conflicting information about the company's position would have been to speak to John Shaw and, if it seemed a misunderstanding stood in the way of further progress in negotiation, to seek a further meeting to ensure that he and his committee had an accurate picture of the respondent's then current position. The same could be said of the omissions in the offer presented by the respondent at the meeting of January 23rd and in the later draft minutes of settlement. Communication is a major focus of the duty to bargain in good faith, and it seems odd to be exploring in hearings before us matters which the union knew about and yet failed to explore at the bargaining table.

Even the concern about what the strike replacements were receiving could have been raised at the bargaining table. The company's ability to pay was an issue it had raised. If something the company seemed to be doing was inconsistent with what it was saying, then the bargaining table was the first place the union could have raised its concerns. There is also the company's initial refusal even to consider renumbering two identically numbered articles. Silly as that position seems, we have to remember that the company moved off that position when the union moved off its opening position, a position which, to the company, may have seemed equally silly. We must be careful not to adopt the approach that concessions that can be made must be made quickly. That would require that this Board decide what the parties' agreement ought to be, and that approach would be completely inconsistent with the notion of free collective bargaining which is central to the *Labour Relations Act*. We must be equally careful about focusing on the degree of sympathy one party shows to the other's presentation, whether by agreeing, offering concessions or asking questions, as a measure of good faith. If the reason for such caution is not inherently obvious, it may be illustrated by asking, rhetorically, how we should react to a complaint that a trade union bargaining committee had responded with insufficient concern and sympathy to an employer's careful explanation of the financial circumstances which, in its view, required that its employees agree to a substantial reduction in pay and benefits. Less hypothetically, how are we to react to Mr. Carriere's failure to ask questions about the financial matters raised by the respondent, and his summary dismissal of these as "the usual financial speech"?

30. Having said all that, we must make it clear that we have carefully considered all of the evidence to determine whether the respondent's behaviour betrays a desire to avoid making a collective agreement. While we are not without our doubts about the motivation for some of the respondent's actions, on the evidence now before us we cannot find, on the balance of probabilities, that the respondent was not prepared to enter into a collective agreement or sought to avoid doing so. It has revealed, when asked, the terms to which it says it is prepared to agree. If the respondent has been bluffing, the union has not yet called its bluff.

31. We have found that the respondent failed to "bargain in good faith and make every reasonable effort to make a collective agreement" in the period immediately following the meeting of September 26, 1983. We do not find the more extensive violation alleged by the complainant. Counsel for the complainant says that this Board's jurisprudence has established that an award of damages is the appropriate remedial response to a violation of section 15. In *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722, the Board noted that an award of damages is not always the appropriate remedy for a violation of section 15 of the Act:

26. Clearly, if employers are to be subject to compensatory orders for breach of the bargaining duty so should trade unions. But not all violations, be they by employers or trade unions, are properly remedied by monetary compensation. For example, failures to rationally discuss items as in *CIL*, [1976] OLRB Rep. May 199 or to provide vital information as in *DeVilbiss*, *supra*, are best remedied by a simple direction. Even if there exists the possibility of some monetary loss occasioned by the resulting delay, this Board should, in the normal course of events, be reluctant to evaluate the loss in monetary terms. Serious consideration of such claims may deflect the Board and the parties from the central purpose of the complaint and add unwarranted time in the processing of such matters. The difficult questions of causation associated with such potential loss particularly raise this spectre and with nowhere near the same justification for a compensatory

approach as exists in the blatantly bad faith situation such as in *Radio Shack* and *Fotomat supra*. Judicial approaches in respect of damage assessments draw their purpose from the substantive law of torts and contracts and therefore should not be imported wholesale into labour relations. This Board must be sensitive to the purpose of its own statute and the particular provisions being construed in fashioning remedies.

32. This is not, in our view, an appropriate case for an award of damages. When the hearing of this complaint was completed in May, the parties had met and bargained, with the assistance of a Ministry of Labour mediator, on two occasions following the respondent's breach. It is apparent from the evidence that by then the parties' failure to reach agreement had little, if anything, to do with the respondent's earlier delay in responding to the complainant's proposals of September, 1983. Both parties are responsible for the state that collective bargaining between them was in when our hearings concluded, and from a labour relations perspective it would be inappropriate to now award any remedy which suggests that that responsibility was otherwise than evenly divided at that point in time. For those reasons, we feel it would also be inappropriate at this stage to direct that the respondent meet and bargain with the complainant at such times and for so long as a Ministry of Labour mediator deems necessary. That is what we would have done had the respondent not returned to the bargaining table, or if there had been any subsequent breach, but neither situation exists here.

33. In summary, we have found and hereby declare that the respondent failed to "bargain in good faith and make every reasonable effort to make a collective agreement" in the period immediately following the meeting of September 26, 1983. It failed to respond promptly to the union's new proposals by returning to the bargaining table to discuss them. It did, however, return to the bargaining table in November, 1983, and again in January, 1984. While it bargained hard on those occasions, we cannot say that it bargained in bad faith. For the reasons we have set out above, we do not consider it appropriate to supplement our declaration with any other order or award. If, as we suspect, the parties have not yet concluded a collective agreement, we urge them to turn their undivided attention to bargaining and devote some creative energy to finding new ways of resolving the differences which remain between them.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I dissent. The evidence in this case would suggest that Doris Shaw, Vice-President of Shaw-Almex and her husband James Shaw had complete control over the company's operations.

2. John Shaw, son of Doris Shaw, was in charge of labour relations for the company. It appears from the evidence that the United Steelworkers representative did not consider John Shaw to have the authority to make labour relations decisions for the company.

3. It was in this atmosphere that contract negotiations for a renewal agreement took place. The union was questioning the authority of John Shaw; the company was unhappy with the attitude of the Steelworkers representative.

4. My opinion from the evidence is that as negotiations proceeded the company kept changing its position on wages, benefits and contract language. The result was that the union could not present what they felt was an acceptable proposal to the membership for adoption, with strike action the final result.

5. I would have found that the company manouvered contract language at the different meetings with the union, made their wage proposals vague and unacceptable to the union membership and throughout negotiations and mediation and frustrated the union with an appearance of surface bargaining.

6. I would have in this decision forced the company to present again the best positions that they had proposed during negotiations, conciliation and mediation meetings on both wages, benefits and contract language changes so that the union could then submit the complete offer to the union for membership action.

1630-84-R Retail, Wholesale and Department Store Union, CFL:CIO:CLC:, Applicant, v. **Simpsons Limited**, Respondent, v. Canadian Union of Operating Engineers and General Workers, Intervener, v. Group of Employees, Objectors

Certification — Practice and Procedure — Employees at work on application date — But having received termination notice to be effective at later date — Whether considered employees for the purposes of count

BEFORE: Harry Freedman, Vice-Chairman, and Board Members W. H. Wightman and B. Armstrong.

APPEARANCES: *Hugh Buchanan and Carole Currie for the applicant; T. Storie and P. Reid for the respondent; no one appearing for the intervener or objectors.*

DECISION OF THE BOARD; October 18, 1984

1. This is an application for certification which came before the Board with two other applications filed by the applicant in respect of two other locations of the respondent. (See Board File Nos. 1650-84-R and 1670-84-R.)

2. At the opening of the hearing, counsel for the respondent raised by way of a preliminary motion, an objection to the Board counting as employees in the bargaining unit, any employees who had received termination notices and were scheduled, as of the date of hearing, to have their employment terminated on November 3, 1984.

3. The majority of the Board, after hearing the submissions from all parties, delivered the following oral ruling. Board Member W. H. Wightman reserved his decision on the preliminary issue raised by the respondent.

RULING

The Board has before it three applications for certification filed by the Retail, Wholesale and Department Store Union in respect of three different groups of employees of the respondent, Simpsons Limited. Although the applications have been and are being treated separately, counsel for the

respondent has raised an argument based on the application in Board File 1630-84-R that applies to all three proceedings. The Board, therefore, heard argument on the issue and its ruling will apply to all three proceedings.

The respondent gave notice of termination of employment, to be effective on November 3, 1984 to several hundred employees on July 11, 1984 in accordance with a national policy implemented by it. That policy resulted in approximately 280 employees in the group for which the union seeks bargaining rights in Board File 1630-84-R, the downtown store, receiving the notice of termination.

Counsel advised the Board that the employees who received this notice of termination would also receive severance pay, provided the employees continued to work until November 3, 1984, unless the company waived that requirement. The Board was also advised that a small number in that group of 280 would be transferred to vacant positions and if the transfer took place, they would not receive severance pay.

Counsel for the company argues that the employees who received notice of termination and who will terminate on November 3, 1984 are no longer employees for purposes of the application for certification, and therefore cannot be considered in determining the level of membership enjoyed by the union. Additionally, counsel submits that even if these persons are technically employees, the Board should deem them not to be employees since those employees, as of receiving notice of termination, no longer have a continuing interest in their employment relationship with the respondent. Counsel further argues that the same policy considerations which prompt the Board to defer processing a certification application and direct the taking of a representation vote in build-up situations (see *F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 246) should also guide the Board here in determining whether the persons receiving the notice should have any bearing on applicant's right to obtain certification.

The union's response to the respondent's argument is brief. It argues that the persons in question were employees as of the date of application and therefore must be included for purposes of the count to determine the union's level of membership.

We agree with the union's submission. Section 7(1) of the Act requires the Board to determine the number of employees in the unit as of the date of application. The Board applies various criteria to make that determination. See *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840 where the Board stated at paragraph 14:

Although the unit time is determined by the provisions of section 7(1), nothing is said in that section or elsewhere in the act concerning the method or criteria to be used by the Board in ascertaining the number of employees in the bargaining unit at the material time. The determination as to whether a person is or is not to be numbered as an employee on the date of application is, therefore, left entirely to the discretion of the Board. To ensure consis-

cy and order in its proceedings and with a view to the purely practical difficulties involved, the Board has adopted certain practices and rules of thumb applicable to the various situations which commonly arise in the employer-employee relationship.

The issue of whether a person is an employee for purposes of the count generally arises when that person is not at work on the date of the application. Thus, the Board adopts the 30-day rule or seven week rule, for example to assist in making this determination. We agree with counsel's submission that these rules are flexible, but in our opinion, flexibility in applying these rules cannot cause the Board to ignore the facts before it. The people in question were at work in the employ of the respondent on the day the application was filed.

A similar, though not identical problem has arisen before the Board where an employee's eligibility to vote was questioned because the employee had given notice of intention to quit before the vote, to be effective the day after the vote. The Board, in that case, held that as she was employed on the date of the vote, she was eligible to vote (see *London District Crippled Children Treatment Center*, [1980] OLRB Rep. April 461). In our view, the principles outlined therein apply here to these facts. The persons in question were at work in the employ of respondent on the application date. The Board cannot change that fact. See paragraph 11 of the *Amplifone* case, *supra*. Therefore, the Board dismisses the respondent's argument. For these same reasons, the Board is not inclined, even if we could, to deem that those persons are not employees.

Counsel for the respondent argued that his submissions would also be relevant to the Board's exercise of discretion to order a vote under section 7(2) of the Act. The Board advised the parties that it would not deal with that related but separate issue until a determination was made with respect to the level of support enjoyed by the union. We wish to make it clear that the question of the Board's exercise of its discretion to order a vote remains open and although the submissions may be similar, the issue of the exercise of the Board's discretion is clearly different from the issue upon which we have ruled.

4. Following the oral ruling, the parties met with a Labour Relations Officer to review the remaining issues in the proceeding.
 5. Following the meeting, the applicant requested leave to withdraw the application. Having regard to the stage of the proceedings when the request was made, the Board denies the application for leave to withdraw and hereby dismisses the application.
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1350-84-R United Food and Commercial Workers Local 206, Applicant, v. V. S. Services Ltd., Respondent

Sale of a Business — Domco having contract with provincial government to provide food services at correctional centre — V.S. Services successful bidder upon retender at end of contract — No sale between Domco and V.S. — *Metropolitan Parking* followed

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *Timothy G. M. Hadwen and Michael Fraser for the applicant; Wallace M. Kenny, D. Mikelburg and R. Ellis for the respondent.*

DECISION OF THE BOARD; October 17, 1984

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2. This is an application under section 63 of the *Labour Relations Act*. The applicant claims that Domco Foodservices Limited (“Domco”) has “transferred” its “business” to V. S. Services Ltd. (“V.S.”) within the meaning of section 63 and that, accordingly, the union retains bargaining rights for the employees of V.S. and V.S. is bound by an existing collective agreement between the union and Domco.

3. A hearing in this matter was held in Toronto on October 11, 1984. The facts were not in dispute, and it is unnecessary to recite them at any length. It suffices to say that Domco had a two-year contract with the Ministry of Correctional Services to provide food services at the Guelph Correctional Centre. The contract prescribed the services in some detail and, as might be expected, in carrying out its duties and responsibilities, Domco had to follow the policies, procedures, and regulations, determined by the Ministry and administered by the superintendent of the Correctional facility. Domco was first engaged to provide these catering services in or about 1978. Its current two-year contract was slated to expire on September 1, 1984. On April 18, 1984, the union was certified (on an interim basis) to represent the employees of Domco working at the Guelph Correctional facility. A final certificate issued on May 24, 1984. On July 17, 1984, the union and Domco executed a document entitled “Memorandum of Agreement”, which is said by the union to constitute a valid and binding collective agreement.

4. In accordance with the Ministry’s established practice, the food service contract was put out for competitive tender in July, 1984. Sealed tenders were to be received by the Ministry no later than July 17, 1984. Domco submitted a bid, as did V.S. and several other catering contractors. V.S. was the successful bidder. By letter dated July 30, 1984, Domco advised its employees that it had lost the contract and that accordingly it was necessary to terminate their employment, effective August 31, 1984.

5. V.S. was scheduled to take over the operation on September 1, 1984. Early in August it approached John Sheehan, the on-site manager for Domco, and offered him continued employment. Mr. Sheehan had only worked for Domco for about ten months, but he was familiar with the site and had extensive experience in the food service business. He had worked for V.S. at the Mimico Correctional Centre for four years, and subsequently he was food service director at a private hospital in Toronto. After that, he spent about three years in business for

himself running two restaurants. Thus, although his tenure with Domco had been short and his responsibilities limited, V.S. decided to hire him. V.S. acquired the remainder of its staff through interviews with Domco's former employees and advertisements in the local newspaper. V.S. hired seven of the approximately thirteen individuals formerly employed by Domco. There was no acquisition or transfer of anything from Domco. Indeed, in the tendering process, the rules specifically prohibited any contact between competitors, and there was none. Nor was there any need for such communication following the selection of the successful bidder. V.S. is an established catering contractor with hundreds of contracts across Canada and its own management control systems which it began to implement at Guelph within the framework of the requirements and regulations stipulated by the Ministry.

6. We do not think it is necessary to dwell upon the evidence. The fact is, that the situation in this case is virtually identical (and legally indistinguishable) from that before the Board in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193. That case also involved a subcontracting arrangement (there with the federal government), and because the issue was somewhat novel, the Board engaged in an extensive analysis of the legal principles applicable in potential successor employer situations. The Board decision was unanimous and its approach has been consistently followed in later cases. On May 7, 1984, the Canada Labour Relations Board issued its decision in *Cafas Inc. v. International Association of Machinists and Aerospace Workers, Local 2300*, 84 CLLC ¶16,034 which quoted extensively from *Metropolitan Parking Inc.* and adopted its reasoning. The *Cafas* case also involved an alleged "sale of a business" when a unionized company providing services to a customer, lost a contract by tender to a non-union competitor. As in *Metropolitan Parking Inc.*, the Canada Labour Relations Board held that there was no "sale of a business".

7. No useful purpose would be served by repeating, in these reasons, the analysis outlined by the Board in *Metropolitan Parking Inc.*. It is sufficient to say that we reaffirm that analysis, and for those reasons, this application must be dismissed.

1404-84-R Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Westburne Industrial Enterprises Ltd.** Respondent

Constitutional Law — Company in business of purchase and sale of electrical and plumbing goods to wholesale market — Division of company providing in-house delivery service — Deliveries made outside Ontario — Whether division separate employer engaged in inter-provincial undertaking

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members A. Grant and L. C. Collins.

APPEARANCES: *Ken Petryshen and Jim O'Donnell for the applicant; W. R. Thornton, G. S. White and R. Abramovitch for the respondent.*

DECISION OF THE BOARD; October 16, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties have agreed on the bargaining unit description. Having regard to that agreement, the Board finds that all employees of the respondent in its Distribution Services Division in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.
4. The respondent's agreement to the bargaining unit description was without prejudice to its position that this Board has no constitutional jurisdiction to hear the application. The respondent submits that the labour relations of its employees fall to be regulated under the *Canada Labour Code* by virtue of section 92(10)(a) of *The Constitution Act*.
5. Mr. G. S. White, the General Manager, Distribution Services Division, testified concerning the business of the respondent. The facts are essentially not in dispute. Westburne Industrial Enterprises Ltd. is engaged in the purchase and resale to the wholesale market of electrical and plumbing goods. In fact, it is the largest distributor of such goods in Canada. Goods are purchased from numerous suppliers in Southern Ontario, proximate states in the U.S.A. and resold to markets across Canada. Westburne, then, is a "middleman" and does not manufacture the goods themselves. Structurally, Westburne Industrial Enterprises Ltd. comprises some fourteen Canadian Divisions and one American Division which operate as separate entities under different names, each of which purchases and resells goods. These Divisions, in turn, operate over 150 branches. The Distribution Services Division, with which we are concerned here, was described as providing transportation services for the other Divisions, as an "in-house" freight forwarding operation. Service is provided to 140 branches in total, 106 outside Ontario and 34 inside the Province. The main centre for this Division is in Mississauga with a parallel operation in Quebec and a satellite operation in Vancouver.

6. The Distribution Services Division is organized as follows. The General Manager, who reports to the Chairman of the Board of Westburne Industrial Enterprises Ltd., runs the day-to-day operations. Next are five managers in Ontario, with separate areas of responsibility, then supervisors, and then employees classified as warehousemen, warehouse clerks and drivers. There is also an office component, including accounts payable and receivable clerks and such like.

7. Product is purchased as FOB origin, FOB plant or delivered. The Distribution Services Division is not involved with goods purchased in the latter category. For goods purchased FOB plant or FOB origin, however, the purchasing Division is free to select whatever means of transportation it wishes, including using Distribution Services Division transport. Some of the Divisions have and use their own trucks for shipping at least some of the goods. The Distribution Services Division, however, is given no "preference" in the selection of a transportation service by the relevant Division and competes with other freight forwarders. However, Distribution Services Division is not a common carrier and all of its business does come from the other Divisions of Westburne Industrial Enterprises Ltd.

8. Product arrives at the Distribution Services warehouse by rail, common carrier and its own trucks, is checked for damage, consolidated into appropriate loads, etc. and shipped out on its own trucks, in other common carriers and by rail. Goods are shipped to Quebec, in particular, via CP piggyback trailers, common carriers for the overflow and Distribution Services' own trucks. These trucks operate to Quebec on a regular, ongoing basis and comprise a significant portion of Distribution Services' total operation. Some products (especially those requiring special handling) are shipped by Distribution Services using its own trucks directly to a customer rather than to another Division. At least one of these customers, Quebec Hydro, receives such shipments on a regular and ongoing basis. Details of shipments to other parts of Canada are not set out as they do not add to the factors to be examined in determining the constitutional question.

9. The respondent argues that the Distribution Services Division is the employer and its business is transportation. Since the facts established that there was regular and continuous forwarding of product to Quebec by Distribution Services' own trucks operated by Distribution Services' own employees, the "business or undertaking" is interprovincial and, hence, falls under federal jurisdiction. *Ottor Freightways*, [1974] OLRB Rep. Oct. 1 and the cases cited therein were referred to in support. Cases such as *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083 and *William R. Barnes Co.*, [1967] OLRB Rep. Sept. 566 were distinguished on the basis that "transportation" was only an "aspect" of the actual business whereas, here, transportation was the only business of the Distribution Services Division.

10. The applicant submitted that *Ottor Freightways*, *supra*, and the cases cited therein, especially, *Attorney-General for Ontario et al v. Winner et al*, *Winner et al v. S.M.T. (Eastern Ltd.) et al* [1954] 4 D.L.R. 657 (J.C.P.C.) and *Re Tank Truck Transport Ltd.*, (1961), 25 D.L.R. (2d) 161 were distinguishable. That is, in those cases, the "business" was transportation and the companies were common carriers. Here, Distribution Services is merely the transportation arm of Westburne Industrial Enterprises Ltd., a company engaged in the purchase and resale of electrical and plumbing goods. The essential nature of Westburne is buying and selling goods, not transportation. Hence, the fact that there is interprovincial transportation of these goods on a regular and continuous basis is not relevant and the operation falls under provincial jurisdiction. In support of its position, the applicant referred to: *William R. Barnes Co.*, [1967] OLRB Rep. Sept. 566; *Domtar Ltd. (Trucking Division)*, [1970] OLRB Rep. July 495;

Compagnie Miron Ltee., [1972] OLRB Rep. Dec. 1034; *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083; *Humpty Dumpty Foods Ltd.*, [1979] OLRB Rep. Apr. 315; *The Lummus Company Canada Limited*, [1975] OLRB Rep. Oct. 773.

11. It is useful to refer to the *Dominion Dairies* case, *supra*, at this point:

5. This Board can only exercise jurisdiction which is lawfully conferred upon it by the Legislature. *Prima facie* labour relations fall within the legislative competence of the province as being within the enumerated jurisdictional head of property and civil rights within section 92(13) of the *British North America Act*. (*Toronto Electric Commissioners v. Snider* [1925] 2 D.L.R. 5 (P.C.)). The labour relations of any federal work, undertaking or business are, however, within the exclusive jurisdiction of the Parliament of Canada and are regulated under section 108 of the Canada Labour Code (R.S.C. 1970, c.L-1, re-enacted by S.C. 1972, c. 18, s.1). The heading of federal undertakings material to this application is found in section 92(10)(a) of the British North America Act which provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, —

10. Local Works and Undertakings other than such as are of the following Classes: —

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Province, or extending beyond this Limits of the Province.

That section of the British North America Act and its interpretation by the courts require the Board to carefully examine the nature of the business or undertaking engaged in by the respondent. If the respondent's business is within the definition of section 92(10)(a) of the BNA Act then its labour relations are exclusively regulated under the Canada Labour Code.

6. The words of section 92(10)(a) have been interpreted as applying only to "means of inter-provincial communications" (*C.P.R. v. Attorney-General of British Columbia* [1950] 1 D.L.R. 721 (P.C.)). The fact that a business extends beyond a province will not mean that the operations of such a business will come within federal jurisdiction unless the business involves transportation or communication. In the C.P.R. case (*supra*), Lord Reid stated:

"There are many companies beside the appellant whose businesses extend over all or most of the Provinces. It was not and could not be suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies." (p.727).

7. When a company carries on a single undertaking which is fairly characterized as inter-provincial communications or transportation it is well settled that its activities are regulated by federal jurisdiction within section 92(10)(a) of the British North America Act, (*Attorney-General of Ontario v. Winner* [1954] A.C. 541 (P.C.)). The characterization of the undertaking is not, of course, an "all or nothing" proposition. The courts have recognized that a company may be engaged in more than one undertaking and that certain aspects of its business may be regulated federally while other aspects fall within provincial jurisdiction. In the C.P.R. case the Judicial Committee of the Privy Council determined that although the Empress Hotel in Victoria was owned and operated by the Canadian Pacific Railway, the operation of the hotel was sufficiently distinct and unrelated to the corporation's rail-roading endeavours as to be subject to provincial regulation of the hours of work of the hotel's employees. Counsel for the respondent submits that the severability doctrine enunciated in the C.P.R. case applies in the instant case. He argues that the trucking and delivery component of the respondent's business are sufficiently separate from its manufacturing activity that the labour relations of employees engaged in trucking and delivery are exclusively within federal jurisdiction.

8. In the past this Board has been required to determine whether a manufacturing operation with trucking facilities would be held to be one undertaking and, if so, whether it would be subject to provincial or federal regulation. When a company operates as a common carrier and its business takes it beyond provincial boundaries its labour relations are exclusively under federal jurisdiction. (*Re Tank Transport Ltd.*, (1960) 25 D.L.R. (2d) 161 (Ont. H.Ct.0). Where, however, a company is not a common carrier and the essence of its business is manufacturing or processing, the undertaking is within the constitutional jurisdiction of the province for the purposes of regulating its labour relations, notwithstanding that the goods manufactured or processed by the company are sometimes sold outside the province and that the company's delivery facilities extend that far. In other words, where the activity is essentially one of manufacturing and where the manufacture and delivery of goods are integrated activities which are part and parcel of the company's total undertaking, the labour relations of all employees of the company fall within provincial jurisdiction. (*Wm. R. Barnes Company, Ltd.* [1967] OLRB Rep. Sept. 566; *Domtar Limited Trucking Division* [1970] OLRB Rep. July 495; *Crane Carrier Canada Limited* [1970] OLRB Rep. Sept. 665; *Compagnie Miron Ltee.* [1972] OLRB Rep. Dec. 1034 and [1973] OLRB Rep. Jan. 61; *Mason Windows Limited* [1973] OLRB Rep. Oct. 547; *F.B.I. Foods Ltd.* [1975] OLRB Rep. June 522; *Catalano Produce Ltd.* [1975] OLRB Rep. Oct. 743). In the instant case, therefore, the issue is whether the trucking and delivery aspect of the respondent's business is sufficiently integrated with its food processing activity as to form part of one undertaking or whether it is severable from the manufacturing component so as to be subject to federal regulation.

11. The respondent's dairy products are distributed directly to stores on a wholesale basis or to homes on a retail basis. Some six percent of its products is distributed by the contractor-drivers who are the subject of this application. Seventy-nine percent of its product is distributed in Ontario and twenty-one percent is distributed in the Province of Quebec. The only distinction in the product which goes to Quebec at the time of the examination was metric labelling which appeared on the packaging marketed in that Province. Some 60 trucks are engaged in delivering the respondent's dairy products both in Ontario and Quebec, in what may be described as the Ottawa Valley region. The trucks fall into three categories; sixteen of them are driven by the salaried employees of the respondent, twenty are owned and driven by the contract drivers who are the subject of this application and the balance are owned and driven by some five private distributors each of whom operates a number of trucks on a contract basis with the dairy. The group of large multi-truck distributors are not a part of this application.

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14. Having regard to the evidence the Board is satisfied that the processing and sale of food is the nature of the respondent's business. It is engaged in dairying, an undertaking that, in the contemporary marketplace includes the processing, distribution and sale of milk, a broad range of milk by-products and citrus juices. The respondent's distribution system through its employee drivers and franchised drivers is integral to its functioning as a dairy. While its system of delivery has gained considerable sophistication since the day of the milkman's horse, it is, nonetheless, dedicated to the same end and remains intrinsic to the overall endeavour of dairying.

15. It would strain reality to attempt to describe the Dominion Dairy as engaged in two separate businesses, one being food-processing and the other being the operation of an inter-provincial trucking business. The respondent is not a common carrier and the trucking aspects of its business have no meaning or function apart from the furtherance of its business as a dairy. For the purposes of constitutional law its distribution and delivery function cannot be seen as separate and distinct from its essential undertaking as a dairy. And the fact that the respondent's products are marketed across inter-provincial boundaries does not alter the essential nature of its business. It is, therefore, not a federal undertaking within the meaning of section 92(10(a)) of the *British North America Act*. For these reasons the Board finds that it has jurisdiction to entertain this application.

12. This Board is of the opinion that this case more closely resembles *Dominion Dairies, supra*, than *Ottor Freightways, supra*. To be sure, Distribution Services is a separate Division of Westburne Industrial Enterprises Ltd. However, this is a function of the size of Westburne, or perhaps its corporate organizational philosophy, rather than evincing a different relationship between the transportation "arm" and the enterprise itself. The fact that Westburne is engaged in buying and selling goods, rather than their manufacture, is not sufficient to distinguish the Dominion Dairies approach to the constitutional issue in view of the decision in *Humpty Dumpty Foods, supra*, where the operation was a distribution centre and was found to be under provincial jurisdiction. Distribution Services is not only not a separate corporate

entity, it is not a common carrier. This is a crucial factor, in the Board's view. It is the status as common carrier which is determinative to the characterization of the operations in *Ottor Freightways*, *Winner* and *Tank Truck*, *supra*, as interprovincial "undertakings". Distribution Services is merely the "in-house" freight-forwarding arm of Westburne. Distribution Services derives all of its business from Westburne and is completely dependent on Westburne for its continued operation. That Distribution Services must compete with common carriers to provide transportation services for their Divisions of Westburne is merely a means of ensuring that the other Divisions in no way subsidize the operation of Distribution Services. It does not change the characterization of those operations with respect to the constitutional issue.

13. Further, although the individuals in the proposed bargaining unit work directly for Distribution Services Division, the only "legal entity" which could be the "employer" is Westburne Industrial Enterprises Ltd. Thus, the Board rejects the respondent's argument that Distribution Services is the "employer" and the "business" of the employer is an interprovincial undertaking within the meaning of section 92(10)(a) of *The Constitution Act*. Moreover, Distribution Services Division, at least while it remains an in-house delivery arm of the corporation, cannot be said to operate a transportation business as did the firms in *Winner*, *supra*, *Tank Truck*, *supra*, etc. In this regard, it is interesting to note that, although the total number of persons in the bargaining unit has not been resolved, there is a maximum of fourteen (14) individuals in the respondent's view and seven (7) in the applicant's view. In *Dominion Dairies*, *supra*, there were nineteen (19) individuals in the proposed bargaining unit. This Board does not believe that the reasoning in *Dominion Dairies* is not applicable to this case simply because the proposed bargaining unit members here are formally within a "Division" of a corporation whereas in *Dominion Dairies* there was not an identical organizational structure. This would be placing form over substance. And the substance is that, in both instances, the individuals perform the same function, i.e., providing the in-house delivery service for the company. In neither instance, were the "businesses" those of common carriers so that the regular, ongoing nature of that business would properly result in characterization as "interprovincial undertakings" and, hence, under federal jurisdiction.

14. For all the foregoing reasons, then, the Board finds that it has jurisdiction to entertain this application.

15. The employer filed a list of employees in the bargaining unit described by the applicant with a total of fourteen (14) names, i.e., thirteen (13) names on Schedule A and one (1) name on Schedule D. The applicant challenged a total of seven (7) of those names, as follows:

- (a) Brad Aitken, Andrea Knies and Cindy Statham, all classified as "warehouse clerk", should be excluded from the bargaining unit as "office" employees;
- (b) Grant Aitken, Robert White and Scott White, classified as "warehousemen", should be excluded as part-time employees and/or students employed during the school vacation period; Andrea Knies, listed above, should also be excluded as a "part-time" employee and/or a student employed during the school vacation period;
- (c) Denis Bouchard, classified as warehouseman, should be excluded as a part-time employee.

16. The Board hereby appoints a Board Officer to inquire into and report back to the Board on the duties and responsibilities of the persons listed in item (a) above and the hours worked and other matters related to the status of the persons in (b) and (c) above as part-time employees and/or students employed during the school vacation period.

17. This matter is referred to the Registrar.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0896-82-R: General Workers Union, Local 1030 of the U.B.C. and J. of A., (Applicant) v. Rampart Enterprises Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0193-83-R: Service Employees Union, Local 204, Affiliated with the A.F.L., C.I.O., and C.L.C., (Applicant) v. TrILERMASTER Freight Carriers Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except sales staff, office staff, warehouse staff, tracers, dispatchers, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (90 employees in unit). (*Pursuant to the agreement of the parties*). (*Clarity Note*).

2479-83-R: Canadian Union of Public Employees, (Applicant) v. Frost Manor, (Respondent).

Unit: "all employees of the respondent in Lindsay, Ontario, save and except registered nurses, graduate and undergraduate nurses, supervisors, persons above the rank of supervisor, and office staff." (33 employees in unit).

2766-83-R: United Food and Commercial Workers International Union, (Applicant) v. Dinnerex Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent in the City of Peterborough, save and except assistant hostesses and persons above the rank of assistant hostess." (50 employees in unit). (*Clarity Note*).

2966-83-R: United Food and Commercial Workers International Union, (Applicant) v. Famz Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees, and Restaurant Employees, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent in the City of London, save and except assistant hostesses and persons above the rank of assistant hostess." (50 employees in unit). (*Clarity Note*).

0020-84-R: United Food and Commercial Workers International Union, (Applicant) v. Bini Foods Ltd., (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent in the City of London, save and except assistant hostesses and persons above the rank of assistant hostess." (35 employees in unit). (*Clarity Note*).

0333-84-R: Ontario Nurses Association, (Applicant) v. 412284 Ontario Limited carrying on business as Pine Grove Nursing Home, (Respondent).

Unit: "all graduate and registered nurses employed in a nursing capacity by the respondent at Woodbridge, Ontario, save and except the Director of Nursing, and persons above the rank of Director of Nursing." (6 employees in unit). (*Having regard to the agreement of the parties.*)

0405-84-R: United Electrical, Radio and Machine Workers of America, (UE), (Applicant) v. Carriere Technical Industries Ltd. — Carr-Tech Distributing Ltd., (Respondents) v. International Association of Machinists & Aerospace Workers, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 195 Nantucket Boulevard, Scarborough, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and engineering staff, and students employed during the school vacation period." (147 employees in unit). (*Having regard to the agreement of the parties*).

0627-84-R: Labourers International Union of North America, Ontario Provincial District Council, (Applicant) v. Roberts Maintenance Dundas Limited, (Respondent).

Unit: "all employees of the respondent in and out of the town of Dundas, Ontario, save and except non-working foremen and persons above the rank of non-working foreman, office and clerical and sales staff." (20 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0769-84-R: United Steelworkers of America, (Applicant) v. Chas. Abel Photo Service Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, sales kiosk employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (233 employees in unit).

0813-84-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Wackenhut of Canada Limited, Alarm Division, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

0984-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC., (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its retail store(s) in the Township of Kingston, in the County of Frontenac, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, students employed on a co-operative program with a school, college or university, and employees of H. B. C. Travel Limited and all employees of The Haircutting Place." (87 employees in unit). (*Clarity Note*).

Unit #2: "all employees of the respondent at its retail stores in the Township of Kingston in the County

of Frontenac regularly employed for not more than twenty-four (24) hours per week save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, students employed during the school vacation period, students employed in a co-operative program with a school, college or university, and all employees of H. B. C. Travel Limited and all employees of The Haircutting Place.” (88 employees in unit). (*Clarity Note*).

1017-84-R: Canadian Union of Public Employees, (Applicant) v. Big Brother Association of Hamilton Inc., (Respondent).

Unit #1: “all employees of the respondent at Hamilton, Ontario, save and except the agency supervisor, executive director, executive secretary and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See: Applications for Certification Dismissed — No Vote Conducted*).

1167-84-R: United Steelworkers of America, (Applicant) v. 387025 Ontario Limited, 237920 Manufacturing Limited, 237906 Manufacturing Limited c.o.b. as “Triflex Displays”, (Respondent).

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff.” (29 employees in unit). (*Having regard to the agreement of the parties*).

1192-84-R: Ontario Nurses’ Association, (Applicant) v. The Regional Municipality of Haldimand Norfolk, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at its Grandview Lodge, Dunnville, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except the Director of Nursing, and persons above the rank of Director of Nursing.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1199-84-R: Toronto Typographical Union, Local 91, (Applicant) v. The Archer Greene Printing Group Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen and persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

1214-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Cochrane Farmers Co-Operative, (Respondent).

Unit: “all employees of the respondent at Cochrane, save and except resident general manager, persons above the rank of the resident general manager, book-keeper secretary to the resident general manager, management trainees, persons regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1261-84-R: Labourers’ International Union of North America, Local 607, (Applicant) v. Canbar Products Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

1262-84-R: London & District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Kitchener-Waterloo Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in Kitchener, Ontario, save and except the secretaries to the Executive Director/Assistant Executive Director, Medical Director, Director of Nursing, Director of Human Resources, Director of Finance and the Director of Hospital Services/Public Relations, the Personnel clerk, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (129 employees in unit). (*Having regard to the agreement of the parties*).

1263-84-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Kitchener-Waterloo Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in Kitchener, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except the secretaries to the Executive Director/Assistant, Executive Director, Medical Director, Director of Nursing, Director of Human Resources, Director of Finance and the Director of Hospital Services/Public Relations, the Personnel clerk, supervisors and persons above the rank of supervisor." (65 employees in unit). (*Having regard to the agreement of the parties*).

1274-84-R: Ontario Nurses' Association, (Applicant) v. The Donwood Institute, (Respondent).

Unit: "all registered and graduate nurses regularly employed by the respondent in the Municipality of Metropolitan Toronto for not more than 24 hours per week save and except department heads, and persons above the rank of department head." (14 employees in unit). (*Having regard to the agreement of the parties*).

1296-84-R: Canadian Union of Public Employees, (Applicant) v. Cambridge Baby Academy Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Ottawa, Ontario, save and except supervisors and persons above the rank of supervisor." (12 employees in unit). (*Having regard to the agreement of the parties*).

1297-84-R: Ontario Nurses' Association, (Applicant) v. Woodstock General Hospital Trust, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Woodstock, Ontario, save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than twenty-four (24) hours per week." (60 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by the respondent, in Woodstock, Ontario, save and except head nurses and persons above the rank of head nurses." (29 employees in unit). (*Having regard to the agreement of the parties*).

1301-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Mar-Marc Foods Ltd., (Respondent).

Unit: "all employees of the respondent in Alexandria, save and except department managers, persons above the rank of department manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

1303-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: “all employees of the respondent at its retail store at 1800 Sheppard Avenue East, Willowdale, save and except department supervisors, persons above rank of department supervisor, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university.” (130 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retail store at 1800 Sheppard Avenue East, Willowdale, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff and students employed on a co-operative program with a school, college or university.” (200 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1306-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: “all office and clerical employees of the respondent at its retail store at 725 Warden Avenue, Scarborough, save and except department supervisors, persons above the rank of department supervisor, secretary to store manager, ‘senior clerical personnel’, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students employed on a co-operative program with a school, college or university.” (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

Unit #2: “all office and clerical employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retail store at 725 Warden Avenue, Scarborough, save and except department supervisors, those above the rank of department supervisor, and students employed on a co-operative programme with a school, college or university.” (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1307-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: “all employees of the respondent at its retail store at 725 Warden Avenue, Scarborough, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university.” (62 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retail store at 725 Warden Avenue, Scarborough, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff and students employed on a co-operative program with a school, college or university.” (81 employees in unit). (*Having regard to the agreement of the parties*).

1308-84-R: Service Employees Union, Local 204 affiliated with S.E.I.U., A.F.of L., C.I.O., C.L.C., (Applicant) v. Harold and grace Baker Centre, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except registered and graduate nurses, activity director, paramedical employees, supervisors, persons above the rank of supervisor, and office staff.” (82 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1319-84-R: United Brotherhood of Carpenters an Joiners of America, Local 93, (Applicant) v. F.G.M. Carpentry, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

1323-84-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Cowall Manufacturing Inc., (Respondent).

Unit: “all employees of the respondent in Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (5 employees in unit). (*Having regard to the agreement of the parties*).

1327-84-R: United Food & Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Eden Packaging Ltd., (Respondent).

Unit: “all employees of the respondent at Thorold, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff.” (29 employees in unit). (*Having regard to the agreement of the parties*).

1334-84-R: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Bytown Lumber Company Ltd. (Queensdale), (Respondent).

Unit: “all employees of the respondent in the City of Gloucester, save and except floor and sales managers, persons above the rank of floor and sales manager, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements.” (5 employees in unit). (*Having regard to the agreement of the parties*).

1338-84-R: The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent).

Unit: “all employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, of the respondent at its Heavy Goods Distribution Centre, 100 Metropolitan Road in Metropolitan Toronto, save and except supervisors, persons above the rank of the supervisor, main office personnel located on the mezzanine floor, security staff, drivers and vehicle fleet maintenance personnel.” (46 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1360-84-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Dalton Home Improvement, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

1361-84-R: Teamsters Chemical, Energy and Allied Workers, Local 424, (Applicant) v. Plastics Plating Company Limited, (Respondent).

Unit: “all employees of the respondent in Whitby, Ontario, save and except foremen, those above the rank of foreman, office and sales staff.” (12 employees in unit). (*Having regard to the agreement of the parties*).

1363-84-R: International Brotherhood of Painters and Allied Trades — Local 1891, (Applicant) v. Quality Drywall Company of Toronto Limited, (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

1370-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Oakville Dominion Furniture Limited c.o.b. as Dominion Home Furnishings, (Respondent).

Unit: “all employees of the respondent in Burlington, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (12 employees in unit).

1375-84-R: United Steelworkers of America, (Applicant) v. Mid Canada Welding and Structural Steel Inc., (Respondent).

Unit: “all employees of the respondent in the City of Thunder Bay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons covered by subsisting collective agreements and persons regularly employed for not more than 24 hours per week.” (10 employees in unit). (*Having Regard to the agreement of the parties*).

1376-84-R: United Steelworkers of America, (Applicant) v. A & F Conveyors Limited, A & F Industries Division, (Respondent).

Unit: “all employees of the respondent in Bolton save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (15 employees in unit). (*Having regard to the agreement of the parties*).

1387-84-R: United Steelworkers of America, (Applicant) v. Mitten Vinyl Inc., (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Waterloo, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (95 employees in unit). (*Having regard to the agreement of the parties*).

1388-84-R: Canadian Union of Public Employees, (Applicant) v. Brodie Nursing Homes Ltd., (Respondent) v. Group of Employers, (Objectors).

Unit #1: “all employees of the respondent in Stoney Creek, Ontario, save and except assistant administrator, persons above the rank of assistant administrator, all registered and graduate nurses, office staff and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See: Applications for Certification Dismissed — No Vote Conducted*).

1400-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Formula Plastics Inc., (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

1431-84-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Turbon Plastic Inc., (Respondent).

Unit: "all employees of the respondent in the Township of Woodhouse, in the Regional Municipality of Haldimand Norfolk, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

1432-84-R: Teamsters Local 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Crystal Springs, (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

1433-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Lock-Wood Windows Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

1434-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:CLC:, (Applicant) v. Gibco Canada Inc., (Respondent).

Unit #1: "all Office and Customer Service employees of the respondent at Burlington, Ontario, save and except Office Supervisor, persons above the rank of Office Supervisor, Secretary to the President, Confidential Assistant to the president and Administrative Manager-Bookkeeper, Inventory Control Supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Burlington, Ontario, save and except Shipping and Receiving Supervisor and persons above the rank of Shipping and Receiving Supervisor, Office, Customer Service and Sales Staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

1456-84-R: International Woodworkers of America, (Applicant) v. Gordon McNabb Pallet Mfg. Ltd., (Respondent).

Unit: "all employees of the respondent at Hepworth, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week." (17 employees in unit). (*Having regard to the agreement of the parties*).

1459-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. The Beefeater Restaurant, (Respondent).

Unit: "all employees of the respondent at 802 Memorial Avenue, Thunder Bay, Ontario, save and except manageress, chef, bar manageress, supervisors, persons above the rank of supervisor, office and sales staff." (25 employees in unit). (*Having regard to the agreement of the parties*).

1467-84-R: United Cement, Lime Gypsum & Allied Workers AFL-CIO-CFL, (Applicant) v. Clareco Canada Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (42 employees in unit). (*Having regard to the agreement of the parties*).

1486-84-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Dallas Homes Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Bargaining Agents Certified Subsequent To A Pre-hearing Vote

0258-84-R: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. P. J. Daley Contracting Limited, (Respondent) v. Labourers' International Union of North America, Local 837, (Intervener).

Unit #1: "all plasterers and plasterers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all plasterers and plasterers' apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic township of Nas-sagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Number of names of revised voters' list		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		10
Number of ballots marked in favour of intervener		0
Ballots segregated and not counted		1

1177-84-R: The Canadian Union of Public Employees, (Applicant) v. The Queensway-Carleton Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener).

Unit: "all employees of the Respondent save and except professional medical staff, registered and graduate nurses, undergraduate nurses, graduate and undergraduate pharmacists, graduate and student dieticians, technical and professional personnel, office and clerical staff, supervisors, persons above the

rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements." (166 employees in unit).

Number of names of persons on list as originally prepared by employer		162
Number of persons who cast ballots	97	
Number of ballots marked in favour of applicant		90
Number of ballots marked in favour of intervener		97

Bargaining Agents Certified Subsequent To A Post-hearing Vote

0470-84-R: Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at 700 Lawrence Avenue West in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretary to the General operations Manager, secretary to the National Delivery Manager, personnel staff, security staff, Bonus Administrator, regional merchandise representatives, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (61 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		95
Number of persons who cast ballots	97	
Number of ballots marked in favour of applicant		59
Number of ballots marked against applicant		27
Ballots segregated and not counted		11

0719-84-R: Retail, Wholesale & Department Store Union, (Applicant) v. Beatrice Foods (Ontario) Limited, (Respondent) v. Modell Dairy Workers Union, (Intervener).

Unit: "all employees of the respondent in its Model Dairy Division at Sault Ste. Marie, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, sales supervisors, office, clerical and laboratory staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (40 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		20
Number of ballots marked in favour of intervener		1

0766-84-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Shaw Pipe Protection Limited, (Respondent) v. International Union of Operating Engineers Local 772, (Intervener), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Welland, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (67 employees in unit).

Number of names of persons on revised voters' list		94
Number of persons who cast ballots	63	
Number of spoiled ballots		1
Number of ballots marked in favour of intervener		36
Number of ballots marked against intervener		26

0887-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit: "all employees of the respondent at its retail stores in the Town of Oakville, save and except Assistant Sales Managers, persons above the rank of Assistant Sales Manager, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, students employed on a co-operative programme with a school, college or university, and all employees of HBC Travel Limited." (75 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots	51	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		35
Number of ballots marked against applicant		15

1049-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent).

Unit: "all employees of the respondent at 700 Lawrence Avenue West in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, building engineer, security staff, office and clerical staff, Lawrence Avenue Salesroom retail staff, drivers and vehicle fleet maintenance personnel, and students employed during the school vacation period." (190 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		253
Number of persons who cast ballots	143	
Number of ballots marked in favour of applicant		108
Number of ballots marked against applicant		34
Ballots segregated and not counted		1

1159-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hopital General de Hawkesbury and District General Hospital Inc., (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit #1: "all lay office and clerical employees regularly employed by the Respondent at Hawkesbury, Ontario, save and except the Secretary of the Executive Director, the Secretary of the Director of Finance and Personnel, the Secretary of the Director of Nursing, supervisors and persons-above the rank of supervisor, persons-regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		30
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		13
Number of ballots marked in favour of intervener		10

Unit #2: (*See: Applications for Certification Dismissed — No Vote Conducted*).

1326-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Morton Tobacco Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Windsor, save and except office manager, persons above the rank of office manager, advance salesmen and persons covered by subsisting collective agreements." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		9
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Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		1

0887-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit: "all employees of the respondent at its retail stores in the Town of Oakville, save and except Assistant Sales Managers, persons above the rank of Assistant Sales Manager, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, students employed on a co-operative programme with a school, college, or university, and all employees of HBC Travel Limited." (75 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots	51	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		35
Number of ballots marked against applicant		15

Applications For Certification Dismissed — No Vote Conducted

2017-83-R: The Ontario Secondary School Teachers' Federation, (Applicant) v. Board of Education for the City of York, (Respondent).

Unit: "all teachers employed by the respondent at Humewood House School, 40 Humewood Drive, in the Municipality of Metropolitan Toronto." (6 employees in unit).

0586-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario operating St. Joseph's Hospital at Sarnia, Ontario, (Respondent).

Unit: "all lay employees of St. Joseph's Hospital Sarnia save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, social workers, social work assistance, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photograph technicians and artists — medical illustrators, registered, non-certified dental assistants, photograph technicians and artists — medical illustrators, registered, non-registered and student: laboratory technicians, X-Ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians, and laboratory assistants) supervisors, persons above the rank of supervisor, foreman, chief engineer, those covered by subsisting collective agreements, office and clerical staff, (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (192 employees in unit).

0815-84-R: London and District Service Workers' Union, Local 220, (Applicant) v. St. Agatha's Children's Village Inc., (Respondent) v. Group of Employees, (Objectors). (52 employees in unit).

0831-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Colautti Construction Ltd., (Respondent) v. Group of Employees, (Objectors). (24 employees in unit).

0936-84-R: London and District Service Workers' Union, Local 220, (Applicant) v. St. Agatha's Children's Village Inc., (Respondent) v. Group of Employees, (Objectors). (23 employees in unit).

1017-84-R: Canadian Union of Public Employees, (Applicant) v. Big Brother Association of Hamilton Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See: Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except the agency supervisor, executive director and executive secretary." (65 employees in unit). (*Having regard to the agreement of the parties*).

1153-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. York County Quality Foods Ltd., (Respondent) v. United Food & Commercial Workers Union Local 1000A, (Intervener). (290 employees in unit).

1159-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hopital General de Hawkesbury and District General Hospital Inc., (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit #1: (*See: Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all lay office and clerical employees of the Respondent at Hawkesbury, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the Secretary of the Executive Director, the Secretary of the Director of Finance and Personnel, the Secretary of the Director of Nursing, supervisors and persons above the rank of supervisor." (12 employees in unit). (*Having regard to the agreement of the parties*).

1275-84-R: United Steelworkers of America, (Applicant) v. Miwy Co. Ltd., (Respondent) v. Group of Employees, (Objectors). (41 employees in unit).

1388-84-R: Canadian Union of Public Employees, (Applicant) v. Brodie Nursing Homes Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See: Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent in Stoney Creek, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant administrator, persons above the rank of assistant administrator, all registered and graduate nurses." (9 employees in unit). (*Having regard to the agreement of the parties*).

1407-84-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Pierre Monette, (Respondent). (4 employees in unit).

1421-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Don Hager Contractor, (Respondent). (5 employees in unit).

1445-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Canadian Pacific Hotels Limited Red Oak Inn, Thunder Bay, Ontario, (Respondent). (133 employees in unit).

Applications For Certification Dismissed Subsequent To A Pre-hearing Vote

1160-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hopital General de Hawkesbury and District General Hospital Inc., (Respondent) v. The Canadian Union of

Public Employees and its Local 1967, (Intervener #1) v. Ontario Public Service Employees' Union, (Intervener #2).

Unit: "all employees of the respondent save and except the medical staff, registered nurses, student nurses, graduate pharmacists, student pharmacists, graduate dietitians, student dietitians, technical staff, foremen and forewomen, persons with a rank equivalent to or superior to foreman and forewoman, chief engineer and clerical staff." (129 employees in unit).

Number of names of persons on list as originally prepared by employer		129
Number of persons who cast ballots	95	
Number of ballots marked in favour of applicant		32
Number of ballots marked in favour of intervener #1		63

1389-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. T. Eaton Company Limited, (Respondent).

Unit #1: "all employees of the respondent at its Retail Store at 333-365 Wellington Street, London, save and except Sales Managers, Merchandise Presentation Managers, Food Services Managers and Foremen, persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Service Manager and Foreman, office and clerical staff, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services, Management Trainees, Personnel Staff, Security Staff, Pharmacists, Medical Services Nurses, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative program with a School, College or University." (80 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		107
Number of persons who cast ballots	104	
Number of ballots marked in favour of applicant		44
Number of ballots marked against applicant		60

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except Sales Manager, Merchandise presentation Manager, Food Services Manager and Foremen and persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Services Manager and Foreman, office and clerical staff, employees of Eaton Travel Ltd., employees of the Eaton Bay Financial Services, Management Trainees, Personnel Staff, Security Staff, Pharmacists, Medical Services Nurses, and students employed on a co-operative program with a School, College or University." (94 employees in unit).

Number of names of persons on revised voters' list		248
Number of persons who cast ballots	240	
Number of ballots marked in favour of applicant		85
Number of ballots marked against applicant		149
Ballots segregated and not counted		6

Applications For Certification Dismissed Subsequent To A Post-Hearing Vote

0934-84-R: United Steelworkers of America, (Applicant) v. DeBartolo Springs Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		11

1099-84-R Labourers' International Union of North America, Local 506, (Applicant) v. Pro-Quality International Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		b8
Number of ballots marked against applicant		10

1128-84-R: Energy and Chemical Workers Union, (Applicant) v. Canadian Fine Color Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 2-10 Sheffield Street and 4104 Weston Road, Toronto, Ontario, save and except foremen, persons above the rank of foreman, technical employees, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (81 employees in unit).

Number of names of persons on revised voters' list		76
Number of persons who cast ballots	71	
Number of ballots marked in favour of applicant		30
Number of ballots marked against applicant		41

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1224-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. MacLawn Spray (1980) Ltd., (Respondent).

1275-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Westburne Industrial Enterprises Ltd., Distribution Division, (Respondent).

1498-84-R: Representatives National Union, (Applicant) v. Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2804-83-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Applicant) v. Townsend and Bottum of Canada Limited, Progress Fab Limited, Tuberate and Besomar Company Ltd. and Tuberate Company, Inc., (Respondents). (*Granted*).

0502-84-R: International Association of Bridge, Structural and Ornamental Ironworkers Union, Local

759, (Applicant) v. 350186 Ontario Limited c.o.b. as Varco Steel and Cambrian Reinforcing, A Division of Claude Plante Construction, (Respondents). (*Granted*).

0904-83-R: Retail, Wholesale & Department Store Union, Local 414, (Applicant) v. Dominion Stores Limited, Willett Foods Limited, Penmarkay Foods Limited, (Respondents). (*Granted*).

1020-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. 368698 Ontario Incorporated, carrying on business as London Sprinkler Co., and 552479 Ontario Inc., carrying on business as Total Fire Systems, (Respondents). (*Withdrawn*).

1254-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Denis Construction Reg'd., Withwood Construction Ltd. and Stile Construction Ltd., (Respondents). (*Granted*).

SALE OF A BUSINESS

0903-83-R: Retail Wholesale & Department Store Union, Local 414, (Applicant) v. Dominion Stores Limited, Willett Foods Limited, Penmarkay Foods Limited, (Respondents). (*Granted*).

1045-83-R: Penmarkay Foods Limited, (Applicant) v. Retail Wholesale & Department Store Union, Local 414, (Respondent). (*Dismissed*). (*Relief under s.63(5)*)

2803-83-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Applicant) v. Townsend and Bottum of Canada Limited, Progress Fab Limited, Tuberate and Besomar Company Ltd. and Tuberate Company, Inc., (Respondents). (*Dismissed*).

0455-84-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. Makivirta Mechanical Contractors Inc. c.o.b. as Ontario Mechanical Contractors 538482 Ontario Inc. c.o.b. as Mountain Stream Energy Systems (Respondent). (*Granted*).

0854-84-R: Aluminum, Brick & Glass Workers International Union, AFL-CIO-CLC, (Applicant) v. 446002 Ontario Limited, (Respondent). (*Withdrawn*).

1019-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. 368698 Ontario Incorporated, carrying on business as London Sprinkler Co., 552479 Ontario Inc., carrying on business as Total Fire Systems, (Respondent). (*Withdrawn*).

1067-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. 112049 Ontario Limited, formerly known as D'Angelo Plastering Co. Limited, D'Angelo Plastering Co. (1983) Limited and Quill Construction Co. Ltd., (Respondent). (*Withdrawn*).

1253-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Denis Construction Reg'd., Withwood Construction Ltd. and Stile Construction Ltd., (Respondents). (*Granted*).

1341-84-R: 446002 Ontario Limited, (Applicant) v. Aluminum, Brick & Glass Workers International Union, AFL-CIO-CLC, (Respondent). (*Withdrawn*).

UNION SUCCESSOR STATUS

1423-84-R: Canadian Union of Public Employees, Local 1182, (Applicant) v. Sudbury Memorial Hospital, (Respondent). (*Granted*).

1424-84-R: Canadian Union of Public Employees, Local 1023, (Applicant) v. The Sudbury Algoma Hospital, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0579-84-R: Leonard Bogar, Rene Campeau and Jacques Beaulieu, (Applicants) v. Local Union 819 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Respondents) v. Oscar Ladouceur & Son Ltd., (Intervener).

Unit: "all employees of the intervener performing plumbing or pipe fitting work in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board Area No. 31 (that is, the United Counties of Stormont, Dundas and Glengarry)." (3 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

0753-84-R: Charles Wogrinetz, (Applicant) v. Local Union No. 126, The United Rubber Cork, Linoleum & Plastics Workers of America, (Respondent) v. Viceroy Rubber & Plastics Limited, (Intervener). (*Withdrawn*).

0988-84-R: Steven Craig McDonald, (Applicant) v. Graphics Arts International Union, Local 211, (Respondent) v. Parr's Print & Litho Limited, (Intervener).

Unit: "all employees of the intervener at Markham, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, security guard, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (33 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	28	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		26

1054-84-R: 124646 Canada Inc., (Applicant) v. United Food and Commercial Workers International Union, (Respondent). (*Withdrawn*).

1139-84-R; 1140-84-R: Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (AFL-CIO-CLC), (Applicant) v. United Food and Commercial Workers Union, Local 1000A, (Respondent) v. York County Quality Foods Ltd., (Intervener). (*Dismissed*).

1290-84-R: Lyle Butchart, (Applicant) v. United Food & Commercial Workers, Local 206, Chartered by United Food & Commercial Workers International Union, (Respondent).

Unit: "all employees of United Co-operative's Warton Branch, save and except Foreman, persons above the rank of Foreman, Office Staff, Field Representative, Retail Store Manager, and those employees who are regularly employed for less than twenty-four (24) hours per week and students hired for the school vacation period and Management Trainees." (1 employee in unit). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

0135-84-M: The De Havilland Aircraft of Canada Limited, (Employer) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W. — CLC), Local 112, (Trade Union). (*Granted*).

0913-84-M: Willson Nursing Home, (Employer) v. London & District Service Workers Union, Local 220, (Trade Union). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1468-84-U: Hickeson-Langs Supply Company, A Division of Oshawa Holdings Limited, (Applicant) v. United Automobile, Aerospace and Agricultural Workers of America, Local 525, Frank Kenny and Those Persons Listed on Schedule "A", (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1627-84-U: T. E. Taylor Construction Limited, (Applicant) v. Brantford Civic Employees Local 181, Chartered by the Canadian Union of Public Employees and Donald Palmer, (Respondents). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3061-83-U: Health, Office & Professional Employees, Division of Local 206, Retail, Commercial and Industrial Union, Chartered by the United Food and Commercial Workers International Union, (Applicant) v. Preston Springs Gardens Retirement Home, (Respondent). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0905-83-U: Retail WHolesale & Department Store Union, Local 414, (Applicant) v. Dominion Stores Limited, Willett Foods Limited, (Respondents). (*Dismissed*).

2986-83-U: Hussmann Store Equipment Corporation, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 397 and Robert Tindale, (Respondents). (*Withdrawn*).

3052-83-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), and its Local 397, (Complainants) v. Hussman Store Equipment Limited and Ray Hawley, (Respondents). (*Withdrawn*).

3090-83-U: Graphic Communications International Union, Local 542, (Complainant) v. L. B. Enterprises 492398 Ontario Limited, (Respondent). (*Withdrawn*).

0047-84-U: Ontario Public Service Employees Union, (Complainant) v. North York Board of Education and Ontario Secondary School Teachers' Federation, (Respondents). (*Withdrawn*).

0265-84-U: Laborers' International Union of North America, Local 1267, (Complainant) v. GTE Sylvania Canada Limited, (Respondent). (*Withdrawn*).

0353-84-U: Gale Grace, (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75, (Respondent) v. Royal Canadian Legion, Ortona Branch 113, (Intervener). (*Dismissed*).

0430-84-U: Merle A. Cromwell, (Complainant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Respondent). (*Withdrawn*).

0526-84-U: United Food and Commercial Workers International Union, (Complainant) v. Swiss Chalet Employer's Association and its member, Rahims Food Limited, (Respondent) v. Canadian Union of Restaurant & Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, and Canadian Union of Restaurant and Related Employees, (Intervenors). (*Dismissed*).

0560-84-U: John Salter, (Complainant) v. Graphic Communications International Union, Local 466, (Respondent) v. B. C. MacDonald, Manager of Industrial Relations Dixie Canada Inc., (Intervener). (*Dismissed*).

0655-84-U: Health, Office & Professional Employees, a division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Complainant) v. Domco Food Services Ltd., (Respondent). (*Withdrawn*).

0656-84-U: Health, Office & Professional Employees, a division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Complainant) v. Domco Food Services Ltd., (Respondent). (*Withdrawn*).

0821-84-U: 124646 Canada Inc., (Complainant) v. United Food and Commercial Workers International Union, (Respondent). (*Withdrawn*).

0850-84-U: Harko Gresel, (Complainant) v. United Cement, Lime Gypsum and Allied Workers' International Union, Local 366 (a Division of the Brotherhood of Boilermakers International Union) and St. Lawrence Cement, Inc., (Respondent). (*Withdrawn*).

0899-84-U: Robert A. Batte, (Applicant) v. Canadian Union of Public Employees, Local 2194, (Respondent) v. The Children's Aid Society of The County Bruce Inc., (Intervener). (*Dismissed*).

0965-84-U: Ontario Public Service Employees Union, (Complainant) v. Royal Victoria Hospital, (Respondent). (*Terminated*).

0965-84-U(A): Ontario Public Service Employees Union, (Applicant) v. St. Joseph's General Hospital, (Respondent). (*Granted*).

0965-84-U(B): Ontario Public Service Employees Union, (Applicant) v. Ottawa General Hospital, (Respondent). (*Dismissed*).

0981-84-U: F. Yhap, (Complainant) v. C.U.P.E. Local 1540, (Respondent). (*Withdrawn*).

0987-84-U: Mary Desjarlais, (Complainant) v. C.U.P.E. Local 543, (Respondent) v. The Corporation of the City of Windsor, (Intervener). (*Withdrawn*).

1030-84-U: Marica Apostolovski, (Complainant) v. Local 19 Metal Polichers, Buffers and Plasters International Union, (Respondent) v. Coro (Canada) Inc., (Intervener). (*Dismissed*).

1032-84-U: International Molders & Allied Workers Union, (Complainant) v. Elgin Handles Limited, (Respondent). (*Withdrawn*).

1060-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. Fidnam (Canada) Limited, (Respondent). (*Withdrawn*).

1064-84-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Steel Cylinder Manufacturing Limited, (Respondent). (*Withdrawn*).

1070-84-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Complainant) v. Marsh Frozen Foods, a division of Willett Foods Limited, (Respondent). (*Withdrawn*).

1072-84-U: Canadian Brotherhood of Railway, Transport and General Workers, (Complainant) v. Howell Transport Canada Inc., (Respondent). (*Withdrawn*).

1074-84-U: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. S. McNally and Sons Limited and Labourers' International Union of North America, Local 837, (Respondents). (*Withdrawn*).

1112-84-U: Labourers' International Union of North America, Local 1059, (Complainant) v. 584134 Ontario Limited and Tom Monk, (Respondent). (*Withdrawn*).

1116-84-U: United Food and Commercial Workers International Union, Local 633, (Complainant) v. Bada Holding Company, c.o.b. as Rose City I.G.A., (Respondent). (*Withdrawn*).

1152-84-U: United Food & Commercial Workers Union Local 409 Retail Clerks Union, Local 409, (Complainant) v. D. H. Food Marathon Ltd., (Respondent). (*Withdrawn*).

1169-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. T. Eaton Company Limited, (Respondent). (*Withdrawn*).

1212-84-U: Joseph G. Giles, (Complainant) v. Joseph F. Kennedy, Richard Kennedy, Frank Porcaro, Frank Giles, (Respondent). (*Withdrawn*).

1216-84-U: Retail Commercial Industrial Union, Local 206, (Complainant) v. Leon's Furniture Limited, (Respondent). (*Withdrawn*).

1221-84-U: Service Employees International Union, (Complainant) v. Flamboro Downs Holdings Ltd., (Respondent). (*Withdrawn*).

1225-84-U: Teamsters Local Union 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. MacLawn Spray (1980) Ltd., (Respondent). (*Withdrawn*).

1238-84-U: Peter Kanellakis, (Complainant) v. Local 75 Union, (Respondent). (*Withdrawn*).

1240-84-U: Felix Brincat, (Complainant) v. Frankel Steel Limited, (Respondent). (*Dismissed*).

1264-84-U: American Federation of Grain Millers (AFL-CIO-CLC) International Local Union No. 388, (Complainant) v. Pillsbury Canada Limited, (Respondent). (*Withdrawn*).

1271-84-U: David S. Fraser, (Complainant) v. Wm. Neilson Limited, Teamsters Local 647, (Respondent). (*Withdrawn*).

1273-84-U: Ron Coulson, (Complainant) v. Charles McCormick, President & Chief Executive Officer, Retail Commercial & Industrial Union Local 206, (Respondent). (*Withdrawn*).

1278-84-U: Hotels, Clubs, Restaurant and Taverns Employees' Union Local 261, (Complainant) v. Fernando Cagigal, Manager, The Mill Dining Lounge Ltd., (Respondent). (*Withdrawn*).

1279-84-U: Reginald Robert, (Complainant) v. U.A. Local 800, Sudbury, M. Zangari Business Manager, R. Scholfield Business Agent, (Respondent). (*Withdrawn*).

1318-84-U: Canadian Union of Restaurant and Related Employees Union, Local 88, (Complainant) v. Pro Catering Limited, (Respondent). (*Withdrawn*).

1322-84-U: Local 1285, U.A.W. Trident Unit, (Complainant) v. Trident Automotive Products Ltd., W. Irwin President, (Respondent). (*Withdrawn*).

1351-84-U; 1352-84-U: Carleton Roman Catholic Separate School Board Employees' Association, (Complainant) v. Carleton Roman Catholic separate School Board, (Respondent). (*Withdrawn*).

1401-84-U: United Steelworkers of America, (Complainant) v. Miwy Co. Ltd., (Respondent). (*Withdrawn*).

1478-84-U: Ron Andrusco, (Complainant) v. Central Ontario Musicians' Association, Local 226 of the American Federation of Musicians, (Respondents). (*Withdrawn*).

1495-84-U: Mohamed E. Sherif, (Complainant) v. C. E. Jamieson & Co. (Dominion) Limited, (Respondent). (*Withdrawn*).

1541-84-U: Michael Bruen, (Complainant) v. International Union — U.A.W. Union and Local 458, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0087-84-U: Canadian Union of Public Employees, Local 1854, (Applicant) v. Country Place Nursing Homes Limited and John Fedyna, (Respondents). (*Dismissed*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

1015-84-M: Dudley S. Burke, (Applicant) v. Retail, Wholesale and Department Store Union Local 414, chartered by the Retail Wholesale and Department Store Union, AFL; CIO; CLC;, (Respondent Trade Union) v. Vanfax Corporation, LOF Glass of Canada Ltd., (Respondent Employer). (*Granted*).

FINANCIAL STATEMENT

1184-84-M: Joe Portiss, (Complainant) v. Laborers' Pension Fund of Central & Eastern Canada, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTES

2648-83-JD: Toronto Typographic Union, Local 91, (Complainant) v. Council of Printing Industries on behalf of Southam Murray (A division of Southam Printing Limited), (Respondent). (*Withdrawn*).

1096-84-JD: Ontario Hydro Employees Union, Local 1000, Canadian Union of Public Employees, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1154-83-M: Ottawa General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

0915-84-M: Canadian Union of Public Employees, Local 2195, (Applicant) v. Youth Services Bureau of Ottawa-Carleton, (Respondent). (*Withdrawn*).

0918-84-M: Hotels, Clubs, Restaurants, and Tavern Employees Union Local 261, (Applicant) v. Citicom Inc. c.o.b. as Windsor Tavern, (Respondent). (*Withdrawn*).

1647-84-M: Canadian Union of Public Employees, Local 1230, (Applicant) v. The Governing Council of The University of Toronto, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1174-84-OH: Dave Wilgress, (Complainant) v. Paris Construction, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

Unfair Labour Practice

Ontario Public Service Employees Union, (Applicant) v. Fanshawe College, (Respondent). (*Granted*).

CONSTRUCTION INDUSTRY GRIEVANCES

2284-83-M: International Brotherhood of Electrical Workers, Local 1788, (Applicant) v. Ontario Hydro, (Respondent). (*Dismissed*).

2517-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. D. Azzolin Plastering & Drywall, (Respondent). (*Withdrawn*).

3065-83-M: Resilient Floor Workers, United Brotherhood of Carpenters and Joiners of America, Local Union 2965, (Applicant) v. Aldershot Flooring Ltd., (Respondent). (*Granted*).

0385-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Ltd., (Respondent). (*Withdrawn*).

0412-84-M: International Association of Bridge, Structural & Ornamental Ironworkers Union, Local 759, (Applicant) v. Varco Steel, (Respondent). (*Granted*).

0629-84-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Eastern Sandblasting and Painting Ltd., (Respondent). (*Granted*).

0685-84-M: International Union of Elevator Constructors Local 50, (Applicant) v. Beckett Elevator Limited, (Respondent). (*Withdrawn*).

1021-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853, (Applicant) v. 552479 Ontario Inc., carrying on business as Total Fire Systems and Canadian Automatic Sprinkler Association, (Respondent). (*Withdrawn*).

1029-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. B & L Gottardo Brothers Excavating Limited, (Respondent). (*Withdrawn*).

1042-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. United Lands Corporation Limited, (Respondent). (*Withdrawn*).

1063-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. General Store Builders div. of 364876 Ontario Ltd., (Respondent). (*Granted*).

1068-84-M: Labourers' International Union of North America, Local 527, (Applicant) v. 112049 Ontario Limited, formerly known as D'Angelo Plastering Co. Limited, D'Angelo Plastering Co. (1983) Limited and Quill Construction Co. Ltd., (Respondent). (*Withdrawn*).

1173-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. O.S.C. Partitions Ltd., (Respondent). (*Granted*).

1186-84-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 172, (Applicant) v. Clifford Masonry Limited, (Restoration Division), (Respondent). (*Withdrawn*).

1254-84-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Stile Construction Ltd., (Respondent). (*Granted*).

1287-84-M: Labourers' International Union of North America, Local 625, (Applicant) v. R. E. DuMouchelle and Sons Limited, (Respondent). (*Withdrawn*).

1288-84-M: Labourers' International Union of North America, Local 587, (Applicant) v. Paul D'Aoust Construction Ltd., (Respondent). (*Withdrawn*).

1292-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. 474442 Ontario Limited, carrying on business as Crown Insulation, (Respondent). (*Granted*).

1310-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Coverlawn Drain & Concrete Ltd., (Respondent). (*Granted*).

1312-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Bay Forming Inc., (Respondent). (*Granted*).

1340-84-M: The Built-up Roofers' Damp and Waterproofers' Section of The Ontario Sheet Metal Workers' Conference, (Applicant) v. Dufferin Roofing, (Respondent). (*Granted*).

1344-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Concord Concrete & Drain Inc., (Respondent). (*Withdrawn*).

1345-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Dangro Const. Service Ltd., (Respondent). (*Withdrawn*).

1346-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Salvador Excavating Limited, (Respondent). (*Withdrawn*).

1347-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Agnoform Construction Limited, (Respondent). (*Granted*).

1379-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Havendale Homes, (Respondent). (*Withdrawn*).

1380-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Beaver Construction Limited, (Respondent). (*Withdrawn*).

1381-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bill Price Excavating Ltd., (Respondent). (*Withdrawn*).

1392-84-M: United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. G. Lavictoire & Brothers, (Respondent). (*Withdrawn*).

1393-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Granted*).

1402-84-M: United Brotherhood of Carpenters and Joiners of America, local 1988, (Applicant) v. H. G. Susgin Construction Ltd., (Respondent). (*Granted*).

1409-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Seebach and Sons (1979) Limited, (Respondent). (*Granted*).

1410-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Ltd., (Respondent). (*Withdrawn*).

1411-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dominion Bridge Co. Ltd., (Respondent). (*Withdrawn*).

1412-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Brian D. Soules Limited, (Respondent). (*Withdrawn*).

1426-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Williams Contracting Ltd., (Respondent). (*Withdrawn*).

1436-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Pigott Construction Company Limited, (Respondent). (*Withdrawn*).

1437-84-M;1448-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Aldershot Contractors Equipment Rental Limited, (Respondent). (*Withdrawn*).

1450-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. PE Ben Pipelines (1979) Ltd., and Pipe Line Contractors Association of Canada, (Respondent). (*Withdrawn*).

1452-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Clay Bradshaw Inc., (Respondent). (*Granted*).

1473-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Orion Forming Limited, (Respondent). (*Withdrawn*).

1474-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Jackson Construction Ltd., (Respondent). (*Withdrawn*).

1487-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. K.E.S. Construction Ltd., (Respondent). (*Withdrawn*).

1503-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Philmor Developments Limited and Mor-Alice Construction Limited, (Respondent). (*Withdrawn*).

1544-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Viewmark Homes Ltd., (Respondent). (*Withdrawn*).

1637-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lednier Construction Co. Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1392-82-M: Local Union 2965, Resilient Floorworkers Union, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, (Applicant) v. The Edwards Design Group Inc., (Respondent). (*Denied*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

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